PROPERTY AND PRIVACY OF CONSCIENCE
IN MONTESQUIEU'S *SPIRIT OF THE LAWS*

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University of Dallas, 2018
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Montesquieu's *Spirit of the Laws* is a sprawling work with six untitled and seemingly unconnected parts. How are these parts related, and how, especially, does the sixth part, on the history of Roman, French, and Feudal laws, relate to the other parts? In particular, why does Montesquieu pay special attention to the evolving understanding of property in these different legal environments, and what might his treatment of this subject have to do with his more well-known treatments of liberty, commerce, and religion?

This dissertation offers answers to these questions through a close reading of the text of *Spirit of the Laws*, paying particular attention to Montesquieu's use of the figure of the barbarian in parts 6, 2, and 3, and connecting these passages to books 11–12, on political liberty, and portions of book 26 on political and civil law. It connects Montesquieu's arguments in support of political liberty—in which he implicitly makes common cause with thinkers like Hobbes and Locke—with the more determinist, historicist, and even sociological portions of his work, which have inspired a different strand of political philosophy. Finally, it gives an account of how parts 4 and 5, on commerce and religion, are based upon the first half of the book.

This investigation yields the following conclusions: Montesquieu reinterprets the history of law in Europe in order to separate out the barbarian spirit from its Christian and Roman admixtures and translate it into the modern context. He takes from the barbarian the grounding of property rights in the individual conscience in order to make psychological security central to the social contract. His teachings on commerce and religion are, in his

order of presentation, manifestations of the barbarian use of property as a sacred and inviolable space of security for the individual. Religious liberty and commercial republicanism are, for Montesquieu, adaptations of the barbarian spirit to the Christian world, meant not to usurp religious authority or undermine virtue, but to make concessions to human weakness. This teaching, however, effectively transforms religion into privacy of conscience, and makes property into the *palladium* that protects that most sacred of possessions.

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OCTOBER 11, 2018

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Au petit agneau

Il faut connoître les choses anciennes,
non pas pour changer les nouvelles,
mais afin de bien user des nouvelles.
Charles-Louis de Secondat

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ACKNOWLEDGEMENTS

This dissertation emerged out of a paper for Joshua Parens' "Philosophy of Law" course, on Plato's *Laws* and Montesquieu's *Spirit of the Laws*. He encouraged me to develop it further, and has been a ready guide and reader of my work. Much that is worthwhile in this project is due to his advice and influence. I am to blame for the mistakes. I am also grateful to my other readers, David Upham and Stuart Warner, for their comments and suggestions.

The Earhart Foundation's funding of my graduate work made this dissertation possible. I also thank Founders Classical Academy of Leander for so arranging things that I could spend my mornings teaching philosophy and my afternoons writing on Montesquieu. My students, my friends, and my family also gave me great encouragement.

INTRODUCTION

With the "infinite number of things in this book,"[1] and the "infinite diversity of laws and mores," there is also, seemingly, an infinite number of treatments of the book that focus on some particular aspect of the work and attempt to read it as a whole through that lens (Preface, ¶¶1, 3). Is Montesquieu's "design" (Preface, ¶2) controlled by an overriding concern for legal moderation, or theological rationalism, or commerce, or liberty, or the ubiquity and destructiveness of despotism, or the importance of history, to give just some examples? In the course of what follows we will have occasion to address many of these interpretations, and to offer one more: the book can be helpfully understood as a whole in light of the principles established in the historical work, especially the first two books, of part 6. From this study, Montesquieu distinguishes different spirits of law that inform his account of human liberty, mores, commerce, and religion, and it is especially the barbarian spirit of law, which informs a unique understanding of property, that he recovers and translates into the modern context in the form of a new understanding of politics, commerce, and religion.

I do not claim here that the principles discovered in part 6 are controlling of the whole work, and that they are what Montesquieu refers to when he says, "I have set down

[1] Preface, ¶1. All references to and translations of *The Spirit of the Laws,* unless otherwise noted, are from Anne M. Cohler, Basia C. Miller, and Harold S. Stone, eds., *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989), hereafter denoted as '*Spirit*.' Parenthetical citations in the body of the text are to this edition. Citations include book, chapter, and where appropriate, after commas, page numbers and/or paragraph numbers. Paragraph divisions are the same in nearly every edition and translation, although they are not numbered in most editions. Occasional reference will be made, in addition, to the part numbers and the two volumes (the first including the material of parts 1–3, or books 1–19; and the second, parts 4–6, or books 20–31) of the 1758 edition. References to the French text and to other works of Montesquieu not translated into English are to *Œuvres complètes*, ed. Roger Caillois, 2 vols. (Paris: Gallimard, 1949 and 1951), and will be denoted as '*OC*' with the volume, and after a colon, page numbers.

the principles, and I have seen particular cases conform to them as if by themselves, the histories of all nations being but their consequences…" (Preface, ¶4). No national principle, or the spirit of any particular people, could constitute a controlling principle for "all nations." But the facts of how these distinct spirits of the law affect each other, and inform and are informed by the mores of a people, do point toward something of the character of the principles Montesquieu alludes to, and claims he has "set down," in *Spirit*. They provide an interpretive framework for the relation between laws and mores and all the other conditions that could affect a nation. From the spirits of the laws, we come to understand *The Spirit of Laws*.[2]

What follows is an attempt to understand the whole work in light of the principles established in part 6, especially the differences between the barbarian, Christian, and Roman spirits of the law. It is an exercise in reading the book backwards, starting at the end, or at least at the first three books of the last part (27–29), and seeing how what we learn in those books informs the rest of the work.

Chapter 1 outlines the questions of interpretation that will drive the inquiry, especially the question of the importance of history in Montesquieu's thought, then draws connections between the last and first parts of the work, justifying the interpretive framework described above on textual grounds as well as by drawing out some contradictions in the work that can only be explained through an understanding of the

[2] Besides this one time, I will use the translation, "*The Spirit of the Laws*." The original English translation by Thomas Nugent omitted the second definite article, as it is required in French but would not be in English. It was not until the 20th century that this usage changed, although for no good reason. As the use of it is standard, however, I have chosen to use it. See *The Spirit of Laws: A Compendium of the First English Edition*, ed. David W. Carrithers (Berkeley and Los Angeles: University of California Press, 1977), "Appendix V: A Note on Thomas Nugent's Translation of the Title of Montesquieu's Work," 480.

material of part 6 in connection with the work as a whole. The chapter goes on to connect these parts through a treatment of book 29, "On the composition of the laws," and a comparison of Montesquieu's philosophic-legislative purpose with Plato's. From there, it proceeds to a close analysis of books 27 and 28, on the origins and revolutions of the Roman and French laws, respectively, finding in Montesquieu's account three distinct spirits of the law which have combined in different ways throughout the history of Europe. Finally, it turns to the last two books of *Spirit*, 30–31, for a brief explanation of how the combination of the barbarian and Roman spirits manifests itself in the despotism of the French monarchy, before providing an introduction to the Salic Law that informs the analysis going forward.

Chapter 2 draws the connections between part 1 and part 2, finding in the often ignored books 9 and 10, on defensive and offensive force, a commentary on Machiavelli which adopts but also transforms the Italian thinker's critique of ancient politics. Here, both the importance of the barbarians and Montesquieu's particular concern with despotism begin to come to light as the background of book 11, on the political liberty of the constitution, including the famous chapter on the English constitution. Chapter 2 examines the presentation of separation of powers, and the question of judicial power simply, through the lens of the distinct spirits discovered in Chapter 1. We begin to understand what Montesquieu means when he suggests that the barbarian mores are at the root of the English constitution.

Chapter 3 draws the connections between parts 2 and 3. First, in order to understand better what Montesquieu means by the constitution and the citizen, the chapter turns to the

distinction between the political and the civil, focusing especially on the two chapters in book 26 which distinguish political and civil right. From these chapters I extract a definition of property that, we come to see, has a barbarian origin, serving to protect the individual from the ravages of other individuals or the state. This understanding of property then informs an examination of book 12, on the political liberty of the citizen, especially focusing on the question of crime and punishment. If book 11 is on judgment, book 12 is on what one can be judged for, and is surreptitiously a book on religion. This chapter, by weaving between parts 2 and 3, shows how mores, manners, and received examples—as seen especially in part 3—are foundational for and prior to political liberty, whether of the constitution or the citizen.

Chapter 4 draws the connections between part 3 and parts 4 and 5. First, however, it examines book 19 as the culmination of the project of using barbarian mores to bring about a new conception of law and liberty. After giving an account of the structure and purpose of book 19, the chapter proceeds to a lengthy examination of the final chapter of the book, on English mores, and interprets it as a precursor and model for what is to be found in parts 4 and 5, on commerce and religion. Finally, the chapter shows the reflection of the foregoing arguments in book 25, the book on commerce in the part on religion, and in book 26, the book on the order of things.

This reading starts backwards, going from part 6 to part 1, and continues in this manner, explaining part 1 only in light of part 2, part 2 in light of part 3, and so on. This method is necessary in order to see barbarian mores at the root of modern liberal republicanism, as Montesquieu suggests they are. Furthermore, it is in imitation of the author

himself, who writes, finally, at the beginning of the last book of the first volume, "I must push things away, break through, and bring my subject to light" (19.1).

CHAPTER 1: THE IMPORTANCE OF PART 6

The Importance of Part 6 to *Spirit of the Laws* as a Whole

There is no comprehensive study of the function of part 6 of *Spirit of the Laws* in the work as a whole. Scholars, even those who give an account of the structure of the whole book, often do not know what to make of it, or do not differ significantly from the view that it is mostly a historical appendix that illuminates Montesquieu's principles with relevant case studies.[3] David Lowenthal writes that the books of part 6, excepting book 29, are not "intrinsic parts" of the work, that they only "illuminate the constitution of modern France by laying bare its historical origins."[4] Other scholars dismiss it as Montesquieu's clumsy attempt to incorporate into his book all the research he had done on feudal and barbarian law.[5] However, there is

[3] For a good, brief survey of the scholarship on part 6 as part of the whole through the first half of the twentieth century, see Roger B. Oake, "*De L'Esprit Des Lois*, Books XXVI–XXXI," *Modern Language Notes* 63, no. 3 (March 1948): 167–71. Later studies which touch on the role of part 6 in the plan of the whole include David Lowenthal, "Montesquieu," in *History of Political Philosophy*, 3rd ed., Joseph Cropsey and Leo Strauss, eds. (Chicago: University of Chicago Press, 1987), 516; Paul Rahe, *Montesquieu and the Logic of Liberty* (New Haven: Yale University Press, 2009), 88–90; Ana J. Samuel, "The Design of Montesquieu's *The Spirit of the Laws*: The Triumph of Freedom over Determinism," *American Political Science Review* 103, no. 2 (May 2009): 318–21; and Diana J. Schaub, "Montesquieu's Legislator: Putting Order in the Laws," in *Principles and Prudence in Western Political Thought*, ed. Christopher Lynch and Jonathan Marks (Albany: SUNY Press, 2016), 154.

[4] Lowenthal, "Montesquieu," 516. See also the transcript of Leo Strauss' course at University of Chicago on Montesquieu, Spring 1966 (leostrausscenter.uchicago.edu/course/montesquieu-ii-spring-quarter-1966), Session 1, p. 1 and Session 6, p. 107.

[5] Characterizations of the work as lacking overall coherence are innumerable, and the remark is a cliché dating back to Montesquieu's contemporaries: see, e.g., Voltaire, "L'ABC," in *Philosophical Dictionary,* trans. Peter Gray (New York: Harcourt, Brace and World, 1962), 497–509. This view prevailed into the twentieth century. See, as the most prominent and influential example, H. Barckhausen, "Le Désordre de *l'Esprit des Lois*," in *Montesquieu, ses idées et ses oeuvres* (Paris: Librairie Hachette, 1907), 253–66. For relatively recent comments to this effect, see Isaiah Berlin, "Montesquieu," in *Against the Current: Essays in the History of Ideas*, ed. Henry Hardy (Harmondsworth, UK: Penguin Books, 1980), 130–61; and Cohler in *Spirit*, "Introduction," xxi. David Lowenthal, in "Book I of Montesquieu's *The Spirit of the Laws*," *American Political Science Review* 53, no. 2 (June 1959): 485–87, summarizes the criticism, especially noting the remark of Carl Becker that *Spirit* is "a book of essays really" (Carl L. Becker, *The Heavenly City of the Eighteenth-Century Philosophers* [New Haven: Yale University Press, 1932], 118). On Montesquieu's careful writing, see also Leo Strauss, *Persecution and the Art of Writing* (Glencoe, IL: Free Press, 1952), 28–29 and 29n11; Arthur M. Melzer, *Philosophy Between the Lines: The Lost Art of Esoteric Writing* (Chicago: University of Chicago Press, 2014), 161, 213–14, 219, 271, 296, 306, and esp., 316; and Stuart D. Warner, "Montesquieu's Address to the Reader: The Prefatory Art of *The Spirit of Laws*," in *Law, Nature, and the Sacred: Essays in Honor of Ronna Burger*, ed. Evanthia Speliotis (Notre Dame: St. Augustine's Press, forthcoming). Montesquieu himself asserts that he has a design for the whole in his Preface, ¶¶2, 15. See also

one sustained, serious attempt to account for part 6 as part of *Spirit* as a coherent whole: Thomas Pangle's *Montesquieu's Philosophy of Liberalism*.[6] It is thus worth examining Pangle's treatment of part 6 briefly at the outset of this work.

In the last chapter of that book, "Natural Law and the Prudence of the Legislator," despite calling book 26, the last book of part 5, "almost the end of [the] work," and book 29, the central book of part 6, "the true conclusion and culmination of *The Spirit of the Laws*,"[7] Pangle treats the question of the reason for part 6, not just the theoretical book 29 but the historical books 27–28 and 30–31, with great seriousness. However, his conclusions, that "Montesquieu… devotes a number of chapters to showing by means of examples" what the statesman or legislator must take into account, or that for the legislator "theoretical knowledge must be accompanied by a knowledge of the variety of particular national characters and above all of the 'general spirit' for whom he gives laws," or that "[t]hese books serve as examples of the kind of research necessary for the lawgiver to undertake," are

Spirit, 1.3, 9; 11.20; 19.1; part III of *Defense of the Spirit of the Laws*, in *The Complete Works of Montesquieu*, 4 vol. (London, T. Evans: 1777), vol. 4, 275–81 (*OC* 2:1160–68); and *My Thoughts*, trans. Henry C. Clark (Indianapolis: Liberty Fund, 2012), no. 2092. (This latter work will hereafter be cited as '*Pensées*' with the number of the *pensée*. This edition follows the original chronological ordering of the Masson edition, not the Caillois edition (*OC*), which followed the thematic ordering introduced by Barckhausen in his edition of *Pensées*.) It has become a cliché of equal magnitude in Montesquieu scholarship to claim to have discovered this design. One could say this tradition begins with D'Alembert's *Analyse de l'Esprit des lois*, found in *Œuvres completes de Montesquieu*, ed. M. André Masson (Paris: Nagel, 1950–55), vol. 1, A, li.

[6] Thomas L. Pangle, *Montesquieu's Philosophy of Liberalism* (Chicago: University of Chicago Press, 1973), Chapter 9, "Natural Law and the Prudence of the Legislator," 260–350. Pangle is mostly inattentive to part 6 in his second, and much more recent, treatment of Montesquieu's thought (*The Theological Basis of Liberal Modernity in Montesquieu's* Spirit of the Laws [Chicago: University of Chicago Press, 2010]), which promises to "take the analysis" to its foundations (10). Those foundations, as the title of his book announces, are theological; they are not historical. Pangle there focuses on Montesquieu's "principles," and especially part 1, and does not treat part 6 as essential to the derivation of those principles. See the Index, 192.

[7] Pangle, *Montesquieu's Philosophy*, 261, 271. See also Strauss, "Montesquieu (Spring 1966)," transcript, Session 6, p. 107 and Session 7, pp. 126–30. This view is "almost" correct, in that Montesquieu almost did conclude with books 26 and 29. See Rahe, *Logic of Liberty*, 216–17, 321n10; and Robert Shackleton, *Montesquieu: A Critical Biography* (London: Oxford University Press, 1961), 320. Barckhausen, cited there by Shackleton, despite his ambitious attempt to systematize *Spirit*, does not even include books 27–28 and 30–31 in his system (*Montesquieu*, 256).

insufficient, or do not go far enough.[8] The first five parts of *Spirit* are full of examples; why at the end of the book does Montesquieu need a prolonged historical account with a book on the legislator in the middle? The answer to this question promises to help us find the point of departure from natural rights liberalism to the historical school, or even from classical to modern political theory. As Pangle points out, *The Constitution of Athens* was no part of Aristotle's *Politics*, not even as an appendix, but something analogous found its way into the body of Montesquieu's *Spirit*: why?[9] Pangle suggests that Montesquieu has more of a legislative intention than Aristotle, and that for Montesquieu, legislation requires, as an "indispensable aid," a political history; that is, the history is not just an aid, but is somehow essential to the legislation itself. Pangle asserts that "this particular historical study has a direct connection with Montesquieu's plans or hopes for French reform."[10]

But what is the connection? Why is the history indispensable? Pangle remains vague on this point. He does write, later in this chapter, "The prudently subdued suggestion of Montesquieu's historical study is the possibility and necessity of a rather thoroughgoing revision of French civil law which would return to the original spirit of the laws of the Franks and oppose the later accretions of canon and Roman law."[11] However, he goes on to say that while the recovery of the French barbarian spirit, conducive to liberty, is somewhat prescriptive, i.e., legislative, it has to be adapted to the modern situation, which requires, for instance, commerce.[12] That reading, which I here accept, promises a reinterpretation of the first five parts of the book in light of the historical account. However, Pangle goes on from

[8] Ibid., 274, 279, 280.
[9] Ibid., 280–81.
[10] Ibid., 281.
[11] Ibid., 287–88.
[12] Ibid., 288–89.

here to interpret books 30–31, finding Montesquieu's purpose there to be the preservation and/or restoration of the balance of powers in the French constitution, and only secondarily the spread of commerce, which he admits is of greater ultimate importance.[13] He does not give an account, as promised, of how the recovered barbarian spirit of independence and freedom, and the maintenance of a balance of powers, does or would contribute to modern commerce; in fact, he distinguishes between Montesquieu's "more pressing" concerns with the French constitution, which do require an appeal to the general spirit of the Frankish barbarians, and the argument that it has endured despite all revolutions, and the larger purpose of extending the principle of the English constitution to Europe through commerce, which does not require a particular, extended appeal.[14] Thus we get two somewhat disjointed purposes: the broader purpose of extending commerce in order to promote the end of security, and the preservation of the French regime in order to enable it to participate in that commerce.

But if Montesquieu's larger reformative project, as outlined by Pangle, is to succeed, it cannot be rooted only in a general description of the mores that contribute to security, as in books 18–19, but also in what Montesquieu makes clear is *our* own history.[15] It is not so much by natural right or through an established law that Europeans—English, French, or otherwise—claim their right to liberty, Montesquieu's presentation suggests, but rather through a recovery of deeply entrenched mores.[16] Consequently, I argue that only an account

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[13] Ibid., 290–91. Cf. Brian Singer, *Montesquieu and the Discovery of the Social* (New York: Palgrave Macmillan, 2013), 94. Singer argues that the purpose of these books is rather to separate "law from power," and thus the civil law governing property from the political law governing rule and justice.

[14] Pangle, *Montesquieu's Philosophy*, 291.

[15] See Montesquieu's many references to "our fathers" ("the Germans"): 4.4; 6.18; 10.3, 140; 14.11, 241; 14.14, 28.17; and 28.20, 560; cf. 31.5, 679.

[16] See Montesquieu's *Persian Letters*, trans. Stuart D. Warner and Stéphane Douard (South Bend, IN: St. Augustine's Press, 2017), Letter 92 ("Usbek to Rhédi, at Venice"), 149.

which makes sense of Montesquieu's description of the non-rational passions that tie peoples to their customs will satisfactorily describe his decision to repeat in part 6, with specific and personal examples, his scattered presentation of the barbarian spirit from part 3, and ultimately, his point of departure from other Enlightenment natural rights theorists.[17] That account must explain, as Pangle's does not, Montesquieu's reference to barbarian customs as "holy things" (30.19, 650), and ultimately relate the sense of the sacred associated with the barbarian mores and customs to their recovery in the context of modern religion and commerce.

From Part 6 to Part 1

I will argue that part 6 is essential to Montesquieu's argument, which requires the uncovering of the spirit of laws which preserve liberty and the identification of the moments and places where that spirit became entangled with others. Only when this has been done can one see how and why Montesquieu, despite his apparent scientific objectivity and neutrality about the mechanisms behind different regimes, prefers democracy to despotism, or liberty and the opinion of security to the alternation between fear and domination. Consequently, only a proper appreciation of part 6 and its importance for the whole of *Spirit of the Laws* can unite the prescriptive and descriptive, the normative and the scientific aspects of Montesquieu's thought.[18]

Montesquieu's clearest statement on the relation of part 6 to the whole of the book is not very clear. In the chapter, "On positive laws," in the introductory book 1, Montesquieu

[17] Cf. Lowenthal, "Montesquieu," 528, penultimate ¶.
[18] Cf. Robert Alun Jones, "Ambivalent Cartesians: Durkheim, Montesquieu, and Method," *American Journal of Sociology* 100, no. 1 (July 1994): 5–14; Lowenthal, "Book I," 497.

writes that laws must relate to many different things, including "the nature and the principle of the government," "climate," "liberty," "religion," "commerce," and finally "to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established" (1.3, 8–9). Montesquieu arguably lays out here the six parts of the book, with part 6 corresponding to this last grouping.[19] However, despite the seeming importance of the origin of laws, the legislators' purposes, and different orders of things in accordance with which different laws have been established, part 6 has not received an exhaustive treatment, nor has it been treated as a key to understanding the meaning of the work as a whole. In contrast, there is no dearth of scholarship about *Spirit* and liberty, commerce, climate and other physical factors, and the nature and principles of the various governments.

This scholarly deficit has many explanations. First, part 6 is the last part of a book which seems already to be complete when we arrive at it. Second, the subject matter is dry, the manner of treatment seemingly repetitive. It is about old laws, outdated customs, and controversies over inheritance of titles and property which are no longer relevant. Third, those most inclined to take *Spirit* seriously as a philosophic whole with an obscure inner logic are most drawn to arguments about the nature of government or the principles of each regime, rather than to historical studies which would seem to be, at best, ancillary. Montesquieu himself, at the end of the chapter just discussed, announces his intention to begin with "the nature and the principle of each government"—in other words, the subject

[19] Oake, "*De L'Esprit Des Lois*, Books XXVI–XXXI," 169–70; Lowenthal, "Book I," 497. Note that the parts are not listed in order of appearance in the book. See Joshua Parens, "Montesquieu on the Middle Class, Commerce, and Religious Conscience" (unpublished manuscript), 16–17. A greater difficulty here is that book 1 was written before the books of part 6, and thus the claim that the last group of relations here listed ("to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established") corresponds to part 6 is questionable; it is more likely that it corresponds to book 26. However, the books of part 6 could have been written with this 'table of contents' paragraph from book 1 in mind.

matter of part 1—and writes that once the principle is understood, "the laws will be seen to flow from it as from their source" (1.3, 9).[20]

However, if the laws flow from the nature and principles of each government, and Montesquieu's study is then a whole rational-scientific, even anti-theological system,[21] what is the purpose of looking into the "origin" of the law? What is the difference between that nature and those principles and the historical origins, or between philosophical and historical beginnings?

It seems especially necessary to answer this question to understand *Spirit of the Laws*. For despite the candor about his system in part 1, where Montesquieu does distinguish between the state of nature and the state of society (1.2–3), there is remarkably little in the book about natural law and natural right, about political beginnings, the purpose of government, and the establishment or enshrinement of justice.[22] The book does begin with a proclamation that all things are governed by laws (1.1, 3), but this does not lead to ironclad, normative standards of justice.[23] Instead, Montesquieu measures government and laws by

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[20] The importance of Montesquieu's "principles," especially as they are independent of divine sanction and authority, is, appropriately, the plank upon which Pangle's *Theological Basis* stands. See, esp., 1–4. Lowenthal, in "Book I," 492, 498; and Stuart Warner, in "Montesquieu's Prelude: An Interpretation of Book I of *The Spirit of Laws*," in *Enlightening Revolutions: Essays in Honor of Ralph Lerner*, ed. Svetozar Minkov (Lanham, MD: Lexington Books, 2006), 174–77, are more reluctant to argue that all of *Spirit* unfolds from the "principles" of Book I, especially its first chapter (but cf. Warner, 200). For Pangle, Montesquieu begins with a "vaunt" (5), an "opening theological blast" (8) or "declaration" (4, 15), "shouting from the rooftop his theological position" (8), one that grounds and informs the rest of the work. For Lowenthal (498) and Warner (177, 196–97), by contrast, those opening theological and cosmological considerations are not so much principles as rhetorical supports for the rest of the work; they are perhaps not independent of the arguments of the remaining 30 books, but are grounded in them, rather than being their ground.

[21] Pangle, *Theological Basis*, "Introduction," 1–10, esp. 1.

[22] Lowenthal, in "Book I," shows that the effect of Montesquieu's argument in that book is to separate ethics, or the realm of philosophy and morals, from the realm of politics and man-made positive law. See, e.g., 491: "the true ethics is never set forth systematically either here or elsewhere in Montesquieu's writings"; and the note appended to that passage, where Lowenthal identifies this as what makes Montesquieu kindred with Machiavelli.

[23] Ibid., 488.

how well each government and set of laws is suited to each people: "Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another" (1.3, 8). A law is good or bad insofar as it conforms to the spirit of the laws—or the relation between all the aforementioned things—and thus, Montesquieu says, "I have had to follow the natural order of laws less than that of these relations and of these things" (1.3, 9); he does not have recourse to arguments from the state of nature as much as he does to historical and social considerations.[24] This does not mean that he rejects any natural basis of law or of the ends of government that follow from man's natural condition and his natural rights, only that Montesquieu deemphasizes arguments from nature, especially nature in the sense of a beginning.[25] He says, accordingly, "I have made no attempt to separate *political* from *civil* laws," i.e., to separate political beginnings, and the purpose of government, from ongoing efforts to maintain a political order once started. Montesquieu certainly does not maintain, in his arguments, any confusion of political and civil law.[26] What he means here is that he is interested in the ensemble of relations which together make the "spirit of the laws," a spirit which can be formed or influenced more or less by political law, depending on the circumstances of different peoples (see 19.4).

This becomes clearer when we consider that the chapter under consideration is called "On positive laws." It is paired and contrasted with the previous chapter, entitled, "On the

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[24] Pangle, *Theological Basis*, 19.

[25] Montesquieu may take this approach because arguments from nature in the sense of a universal standard of perfection can be confused with arguments from nature in the sense of principles, or a beginning that gives guidance about the ends of the law. These two senses may be in harmony, especially if one assumes divine providence, but they may be in conflict especially if divine providence does not extend to human things. This distinction is at work in the movement of book 1, from the laws of God in the first chapter to the laws of man in the third. See Lowenthal, "Book I," 490; Pangle, *Theological Basis*, 20; and Warner, "Montesquieu's Prelude," 184–85.

[26] See, e.g., 5.5, ¶¶1–2; 26.15–16.

laws of nature." When Montesquieu talks about political law as opposed to civil law, he is not talking about fundamental natural laws that would incline men toward government and would, for example, incline one to favor defense over religious precepts (25.7); he is talking about the particular "order of things" established by each people. It may be that parts 1 and 6, on principles and origins respectively, are ultimately about the same thing, but that Montesquieu has an interest in separating them because one has the appearance of philosophic and scientific clarity, while the other has the stain of particularity and history.[27] Montesquieu ends book 1 by saying, "[I]f I can once establish [the principle], the laws *will be seen to flow from it as from their source*. I shall then proceed to other relations that *seem* to be more particular."[28] Is it possible that he here reveals a rhetorical project of inventing the springs of the different kinds of government from the very particularities which he argues have followed from those very springs?

This claim may not be very radical, only that Montesquieu has invented some principles of government, and shown how various circumstances follow from them. Of course, he, and any other thinker, would arrive at principles only after some experience of particulars. However, if the principles are not really principles but rather descriptions of the relations between the various concerns of politics—customs, mores, laws, climate, religion, and others—the claim would be much more radical. It would mean that for Montesquieu, there are no philosophic principles, or beginnings, in politics, but rather historical origins which give to each people a peculiar social spirit that informs all relations for each regime in

[27] This partly explains why chapter 29, "On the way to compose the laws," is in part 6. See Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003), 18–19.
[28] Emphasis added.

which their spirit is embodied.[29] Just as the barbarian law codes were written only to "preserve" usages that already existed (28.1, 532), Montesquieu's principles are not general discoveries, but particular ones: what is needed now, in this circumstance. Insofar as law rules in politics, it has its effect not from universal principles, but from custom, from a sense of what is one's own, what is set apart, what is holy and inviolable. Moreover, the origin of these principles is the prudence of the legislator in attending to particular circumstances, and not the application of universal principles of justice, whether these have their origin in human reason, divine sanction, or both.[30]

Ovid Epigraphs

The question of the importance of part 6 to the whole of *Spirit of the Laws*, or especially of

[29] See 28.15: "I am speaking of the general spirit of the German laws, their nature, and their origin; I am speaking of the old usages of these peoples indicated or established by these laws...."

[30] This thesis can be rendered in softer and harder forms. The soft version simply notes that Montesquieu does not prescribe one form of government for all places and attends to the needs of each place and each people. Despite the occasional commentator who holds that Montesquieu prefers one form of government as best, this observation of Montesquieu's "particularism" is nearly ubiquitous, although scholars differ widely on their interpretations of its consequences and premises. Joshua Bandoch, in *The Politics of Place: Montesquieu, Particularism, and the Pursuit of Liberty* (Rochester, NY: University of Rochester Press, 2017), argues that Montesquieu advocates no single form of government, but does hold that all regimes should promote security, liberty, and prosperity. Bandoch argues that these ends are achieved through the aim of the legislator and that they are grounded in nature. Dennis C. Rasmussen, in *The Pragmatic Enlightenment: Recovering the Liberalism of Hume, Smith, Montesquieu, and Voltaire* (Cambridge: Cambridge University Press, 2013), 83–96, argues, by contrast, that while Montesquieu aims through his work to promote liberty and oppose despotism, he does so not by reference to a natural standard but through negative examples that serve to persuade the reader of the undesirable consequences of despotism. By contrast, the sociological school deemphasizes or ignores the role of the legislator and the universality of legislative ends and instead places Montesquieu in the role of impartial scientific chronicler: see Émile Durkheim, *Montesquieu and Rousseau: Forerunners of Sociology*, trans. Ralph Manheim (Ann Arbor: University of Michigan Press, 1960), 19–23, 48–49; Werner Stark, *Montesquieu, Pioneer of the Sociology of Knowledge* (Toronto: University of Toronto Press, 1961), 195–96; Raymond Aron, *Main Currents in Sociological Thought*, vol. 1, trans. Richard Howard and Helen Weaver (New York: Basic Books, 1965), 17–18, 27–28, 55–56; and Jones, "Ambivalent Cartesians," 10, 24. The hard version strongly emphasizes both the legislative intention of Montesquieu's writing along with its arbitrary or prudential basis, divorced from divine sanction and arguments from nature, and promoting both an antitheological enlightenment and a new science of human achievement. For this version, see Pangle, *Theological Basis*; Lowenthal, "Book I"; and Pierre Manent, *The City of Man*, trans. Marc A. LePain (Princeton: Princeton University Press, 1998), 11–85.

the relation of part 6, containing Montesquieu's historical material, to part 1, containing a treatment of law generally, is thus crucial. In part 6, we find distinct legal environments which undergo historical transformations and revolutions; in part 1, we find the claim to principles of universal applicability (1.3, end). In part 6, history is the guide for the legislator, and the historical conditions of law are more important than the law itself (see 19.6–14); part 6 contains Montesquieu's history-teaching. Part 1 has the appearance of universality, of human laws with distinct natures and principles, and it these that are to guide the legislator (book 5, title); part 1 contains Montesquieu's nature-teaching. This, of course, is an oversimplification, because there are elements of both what we are calling nature and history in both parts. Indeed, the argument of this chapter is that we should connect them, finding identity where there seems to be great difference, and thus discover Montesquieu's purpose as a philosophic legislator.[31]

Montesquieu gives an indication of his purpose through the use of two enigmatic Latin epigraphs taken from Ovid's *Metamorphoses*. The first of these is placed at the beginning of the book; the second is found in part 6, at the beginning of book 28, between the chapters on the origin and revolutions of Roman and French law.[32] The first is "*Prolem sine matre creatum*," or "a creature born without a mother." In Ovid's poem this refers to Erichthonius,

[31] The notion of philosophic legislation, or legislating through one's writing, which Montesquieu alludes to at 29.19, already contains a combination of or connection between nature and history. The philosopher studies nature; insofar, however, as he 'legislates' by giving a teaching about nature, he acts historically, providing an understanding of nature meant to address his particular historical situation. I discuss this notion at length in the Conclusion, "History and Prejudice," below.

[32] In the Cambridge edition, the first epigraph is opposite the copyright page (v), but it was intended to appear on the half title page of the first volume (books 1–19), as it did in the 1748 and 1749 editions. In the otherwise superior 1750 edition, divided into three volumes, the Ovid epigraph governs only the first volume, including parts 1 and 2. The Cambridge edition follows the posthumous 1757 edition, in which all the volumes have the Ovid epigraph at the beginning, and the Vergil quotation meant to introduce the original second volume (books 20–31) is an introduction to book 20 only. The second Ovid epigraph appears at the beginning of book 28 in all editions.

an early king of Athens born, according to the story, from Hephaestus' lust for Athena, but without copulation. With this epigraph Montesquieu could, of course, just be saying that his work is original, unprecedented. He could also be identifying himself with the artisan god, but Erichthonius is born from semen, not through the god's art. More likely, he contrasts this birth out of passion with the way Athena was born, from the mind of Zeus, and thus contrasts his method of looking at the somewhat accidental "spirit" of the laws from the ensemble of conditions with the more essentialist approach of the ancients, that is, with the focus on the best regime. Perhaps, though, this motto is also meant to indicate the way in which the spirit of the laws comes into being: not according to philosophic principles, but largely through historical accidents.[33] Erichthonius is also said be to motherless in that he is autochthonous, or born from the earth. This is the sense in which Montesquieu understands the Germanic customs and law. They do not have their power from being created by a legislator, or through natural law, but from the sense that they are sacred, from being holy.[34]

This is not to say that Montesquieu goes as far as Hegel or even Rousseau in attributing the genesis and development of political orders to accident, a super-rational process, or both.[35] Precisely by placing book 29, on the composition of laws, in the part of

[33] It is also possible to interpret this motto to mean that laws, and human things generally, do not have an extrahuman "mother," that they are products of human will, and that as there is no Providence or supernatural will directing human affairs, human beings may understand the laws of human behavior and set up institutions with that understanding in mind. As things follow certain laws, they follow clearly and predictably from principles. This interpretation is consistent with the strong anti-theological reading of Montesquieu characteristic of Pangle's *Theological Basis*.

[34] This is crucial to understanding Montesquieu's treatment of religion, commerce, and liberty: one has to feel that one's liberty is a sacred and inviolable thing, so the religion must be informed by a spirit of moderation and tolerance, rather than guided by counsels of perfection. This is not made possible by adhering to Enlightenment principles of natural right and religious toleration, but by commerce's indirect method of putting wealth out of the power of monarchs, and connecting man's vanity to material acquisition rather than to pious devotion.

[35] Lowenthal, in "Book I," 492, notes that Montesquieu indicates in 1.2 a theory of the historical development of ideas, but does not follow through on it in the rest of the work.

his book on historical origins and the development of laws, and in the final chapter of that book, "On legislators," including not statesmen but writers, he attributes great legislative power to his own literary activity (29.19). However, even there he speaks of how the laws "meet the passions and prejudices of the legislator"; the laws are first, and the writer interprets them in a particular way.[36] Montesquieu's own ambition, as we will see, is to bring back to light old laws and in so doing to rehabilitate, for a new era, the spirit behind them. In this way, he will be legislative. But he will not really be creating new laws; that is not the language he uses. Instead, he often speaks of *showing* the laws, of making them *seen*. It is thus persuasive to interpret what he says at the end of book 1, "[I]f I can once establish [the principle], the laws *will be seen to flow from it as from their source*"[37] to mean that the principle only *seems* to be the source, that by making the principle seen through interpretation, he is acting as a kind of philosophical legislator, deriving a philosophic principle from historical material.[38]

The other inscription from Ovid, at the beginning of book 28, is, "*In nova fert animus mutates dicere formas/Corpora*…," or as the Cambridge translators have it, "My imagination brings me to speak of forms changing into new bodies…." This is the very first line of *Metamorphoses*, but Montesquieu did not put it at the beginning of his own work. There, he needed to boast of the solidness of his principles and their soundness for interpreting different legal regimes. Here it seems he only writes of historical transformations. However, that would not seem to require the use of an inscription from Ovid, needlessly pointing back

[36] Cf. Pangle, *Montesquieu's Philosophy*, 278, and *Theological Basis*, 145; and Carrese, *Cloaking*, 60–61, 84–85.
[37] "…et si je puis une fois l'établir on en verra couler les lois *comme* de leur source." Emphasis added.
[38] Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press: 1953), 286–87 and n56. Cf. Manent, *City of Man*, 14.

to the beginning of the book. Instead, by doing this he both identifies the activity of speaking of changing forms with the motherless creature, or the philosophic beginning in identifying principles, and he identifies himself with Ovid, the philosopher-poet who uses his mind (*anima*) to speak of forms which the gods themselves have changed.[39] Of course, Montesquieu elides the section about the gods; the bodies have changed forms, and he identifies how: that is the real act of creation.[40]

Ovid makes two more appearances in book 6: in book 30, on the "theory" of French feudal law. The first is appended to Montesquieu's characterization of Boulainvilliers and Dubos as proponents of extreme theories, the one "a conspiracy against the third estate," the other "a conspiracy against the nobility" (30.10, 627n25). Here he renders in French the Sun's advice to Phaethon not to drive the chariot too high or too low, too far to the left or the right, implying that his own system or "theory" of the French feudal laws is a moderate middle path.[41] This third reference to Ovid yields the matter and the means for Montesquieu's imposition of form on the laws as a founding act of philosophic legislation:

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[39] *Metamorphoses*, 1.2; cf. Pangle, *Theological Basis*, 66. Schaub, in "Montesquieu's Legislator," 154, also notes the connection between these two epigraphs in indicating "the centrality of metamorphosis to Montesquieu's project," although she incorrectly notes that the first is "the epigraph to the work as a whole." See the following note.

[40] See Plato, *Republic*, 382d and context. The first Ovid epigraph should also be compared with the epigraph from Vergil that opens books 20 in the Cambridge' edition, following the 1757 text. This is because the first quotation from Ovid was meant to introduce the first volume, including parts 1–3 and books 1–19, while the Vergil epigraph was to introduce parts 4–6 and books 20–31. I first heard this observation made by Stuart Warner in his April 2018 lecture at University of Dallas, "By Land and By Sea: The Mythic Beginnings of *Spirit of the Laws*."

[41] Warner notes, in "Montesquieu's Prelude," 165–66, that Montesquieu leaves out, in his French translation, but not in the Latin provided in the footnotes, the passages, "Do not go too low, or go too high through the ethereal region" and "Go the middle way: it is the safest." Montesquieu thereby indicates to us both the hidden character of his middle-path philosophical-legislative project, and its purpose: safety. One might reasonably ask, though, whether safety is the reason for taking the middle path, or the end of the flight. Is it Montesquieu who flies the chariot who is to be safe, or the earth over which he flies? And is this path safest because it is most likely to bring the flight to the truth of the historical investigation, or because it will be least likely to leave a scorched or frozen earth in its wake?

by digging up the "roots" of French feudal law and showing their original source in the "usages and customs" of the barbarians, he brings into being a new creature, one that combines the ancient, shaggy autochthony of the barbarians with the novelty of Christianity and the modern commercial enterprise.[42]

Montesquieu's Purpose

Montesquieu's concern for unwritten law and customs, and his relative lack of discussion of natural law philosophic beginnings, is what most strikes any reader who takes up Montesquieu in comparison to Hobbes, Locke, Rousseau, and his other Enlightenment contemporaries. Instead of writing primarily about principles of justice and government, as they do, Montesquieu devotes most of his attention to actual laws and illuminates his arguments with such a wealth of examples that the point of his writing seems rather to be to make sense of all the particulars than to prove anything abstract through reference to the concrete. He focuses on mores, manners, and traditions and shows how these develop into law and are affected by law.

This said, it is not in serious doubt that Montesquieu accepts the foundation of political right in the universal desire for self-preservation and the Hobbesian conclusion that

[42] The final reference to Ovid is in 30.11, 629n25, attached to Montesquieu's remark, "When one examines the records of our history and our laws, it seems that everything is a sea and that the sea lacks even shores." The quotation from Ovid is, "…*Deerant quoque littoral ponto*," or "shores were lacking [even] to the sea." This reference to the universal flood echoes the subject of the chapter, which is the inundation of serfdom and servitude in lands formerly held by freemen. See Schaub, "Montesquieu's Legislator," 168n17. It also subtly indicates, as Montesquieu makes this remark following a seemingly approving account of the practice of bishops to use the money of the church to buy back captive freeman, the way that in despotic times even those institutions which could oppose despotism indirectly support it. See 2.3, 18, where he writes, after referring to "the power that alone checks arbitrary power," by which he means "the power of the clergy," that "the sea, which seems to want to cover the whole earth, is checked by the grasses and the smallest bits of gravel on the shore." See also 8.17: "Rivers run together into the sea; monarchies are lost in despotism."

political justice is grounded in a kind of contract, justifying rule by the consent of the governed.[43] However, he is less concerned in *Spirit* with arguing for the truth of those philosophical positions, than with laying bare the spirit in which they were discovered. Montesquieu investigates how natural right came to be understood as natural, how it came to be thought that all men simply by virtue of being human beings have the right to life, liberty, and property.[44] The investigation in part 6 is meant to show the historical origins of this understanding of natural right in the spirit of the Germans, and contrast it with the alien elements with which it was mixed.

Montesquieu is especially candid about the purpose of part 6 in his *Pensées*. He writes, "In reading the Barbarian law codes, I was looking for jurisprudence in its cradle."[45] He compares himself to Michelangelo swearing to put the Pantheon in motion: "These antique laws, lying on the ground—I will expose them to the view of all."[46] He makes clear what he wishes to expose in the next entry. The "primitive laws" must be distinguished from the capitularies, "the laws added on." This is a challenge because one can only see the barbarian laws, which were only written—in Latin—upon contact and mixture with the Romans, when they are already being superseded:

> You arrive there, and it seems that the entire body of jurisprudence is collapsing, and everything is crumbling beneath your feet. A majestic river is going underground and vanishing. Wait a moment; you will see it reappear and give back its waters to those who were no longer looking for it.[47]

The barbarian laws are the majestic river which has disappeared, but Montesquieu will

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[43] See 26.1; 9.1; 9.3; 11.6, 164, 171; 28.29, 580; Lowenthal, "Montesquieu," 514–16, 519; and Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore: Johns Hopkins University Press, 1989), 219–21.
[44] Cf. Singer, 93.
[45] *Pensées*, 1937.
[46] Ibid., 1938.
[47] Ibid., 1939.

make it reappear; he will "expose" the spirit of barbarian Europe "to the view of all" and make it once more the inspiration of jurisprudence.

Spirits of the Law

Very broadly, there are three distinct spirits in the law codes Montesquieu examines: the Germanic, the Roman, and the Christian. Montesquieu's goal in part 6 is to distinguish and separate these and thereby to recover the original spirit of Germanic law.[48] He is often quite explicit about the need to separate the Germanic from the Roman, but for somewhat obvious reasons he is less clear about distinguishing the original spirit of Roman law from its later transformations under the influence of Christianity. It is nevertheless important to make that distinction, for it is the Christian ideal of spiritual perfection which, according to Montesquieu, makes the recovery of the Germanic spirit, with its emphasis on the security of the individual and protection for the rights of the criminal, so necessary.

Montesquieu begins part 6 by demonstrating his method on Roman law, showing "the origin and revolutions of the Roman laws on inheritance" (27, title). Inheritance is particularly important because it is through inheritance that one can participate in the political order. It will be the question of inheritance and its relation to political law that dominates the investigation of Germanic laws as well. However, whereas the purpose of the Roman law on inheritances is to maintain the households which make up the city, and thus to restrict the power of the individual to dispose of his property as he wishes, the purpose of the Germanic custom is to preserve the individual's property and through this, his sense of security. One belongs to the Roman political order through belonging to the political whole;

[48] See Pangle, *Montesquieu's Philosophy*, 282.

one has property because one is a citizen. One belongs to the German political order, on the other hand, by being capable of defending one's own property and oneself, and bringing that individual ability to the defense of the common (see 26.15, ¶4; 18.28).

However, separating the German from the Roman is made more difficult because each is further affected by a third spirit: the Christian. By the time we get to part 6, Montesquieu has already characterized the spirit of Christianity in part 5, on religion, but he does not make the distinction as clearly when discussing actual historical examples. Consequently, one must read between the lines a bit to identify where Montesquieu is attributing a change or revolution in the laws to the effect of Christianity. For instance, Montesquieu contrasts Roman law under Constantine, Theodosius, and Justinian—Christian emperors—with the original spirit of Roman law, but does not identify these emperors as Christians. He describes St. Louis' attempts to reform barbarian law, but does not ascribe that reforming spirit to Christianity.

Identifying and characterizing these different spirits in the law is further complicated by their combinations. The later Roman Empire has both a Roman and a Christian spirit. The early feudal period has a Christian-German spirit, and in those places where Germanic tribes conquered the remnants of the Roman Empire, a German-Roman/Christian spirit. In the late middle ages, with the recovery of the *Digest* of Justinian, law takes on a monarchic, Christian-Roman spirit and retains its free Germanic character only dimly. What all these combinations mean in any single case is complicated, but that there are always these combinations means that Montesquieu's criticism of any single legal regime is not a criticism of Roman right, Christian counsels, or Germanic mores, but of how they can combine in a way that is detrimental to liberty. For example, it may not be Christianity that is responsible

for the Inquisition, but the way Christianity combines with premodern law and the bloodiness of the barbarians.

The Roman Spirit

Book 27 is entitled the "ONLY CHAPTER on the origin and revolutions of the Roman laws on inheritance"[49] probably to highlight the unitary character of Roman political law rather than the universal-monarchic later Roman empire, both before and after Christianity. By contrast, book 28 has 45 chapters.[50] Whereas the Germanic law is rooted in the need to preserve the rights of the individual, the Roman law is preserved through the maintenance and preservation of families for the good of the state. Book 27 shows that the Roman law intended to check the desires of individuals even in matters of filial love and piety, in order to preserve the state whole and not to lose a household.[51] In the German law, the house exists to protect the individual; in the Roman, the house exists for the city. Consequently, where among the Germanic peoples we find plurality and difference, among the Romans we find unity and sameness. It is essential to keep this distinction in mind as one reads book 28, where one reads of the revolutions in French civil law, and later, books 30–31, on fiefs and the monarchy, as there we find great differences between barbarian peoples according to the extent to which they settled in formerly Roman territories and adopted the principles of

[49] Capitalization in original.

[50] This is the most of any book. See *Carrese*, Cloaking, 85. The best guess for why there are specifically 45 chapters is that that was the number of French provinces (34) and *parlements* (11) at the time *The Spirit of the Laws* was written. If this was Montesquieu's intention, his cleverness about the number of chapters or sections may have influenced Tocqueville: in Part 1 of Volume 1 of Tocqueville's *Democracy in America*, Chapter 5, "Necessity of Studying What Takes Place in the Particular States before Speaking of the Government of the Union" has 13 sections, for the original 13 colonies, while Chapter 8, "On the Federal Constitution," has 23 sections, for the number of states at the time of composition. Titles from Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Debra Winthrop (Chicago: University of Chicago Press, 2002).

[51] See especially p. 522.

Roman right, and consequently, the Roman views on property and inheritance. For example, it is the Salic Franks who most retained the Germanic understanding of property and inheritance, while the laws of the Visigoths, Burgundians, and Lombards, in varying degrees, took on a Roman character.[52]

The unitary spirit is not unique to the Romans but is characteristic of ancient law generally. Although Montesquieu does not connect the Roman law to any other laws in book 27, he does give indications elsewhere that what is true of Roman law is often true, generally, of premodern law. This is seen especially in book 29, where Montesquieu speaks about the "Greek and Roman laws" together (29.12, title), switching between Greek and Roman examples. While he does occasionally contrast the Greeks and the Romans, this contrast is minimal when compared to the contrast between premodern and modern laws, and is sometimes attributable to the later, Christian influence on Roman laws. In a chapter entitled, "That, without having the same motive, both Greek and Roman laws punished the killing of oneself," Montesquieu points out that there was no prohibition of suicide in Rome during the republic; it was only under the empire that this law was made. He cites a "Rescript of Emperor [Antoninus] Pius, a second century emperor who was not Christian and reigned long before Christianity became the religion of the empire. However, later in book 29 he connects the practice of writing "rescripts"—revisions or reinterpretations of decrees and edicts by emperors responding to inquiries from judges—to "the decretals of the popes" (29.17) and notes how they were favored by the Christian Eastern emperor Justinian.[53] Here,

[52] See, especially, 28.3–7.

[53] Cf. 28.8, where Montesquieu writes of a capitulary that transformed the "particular law" of the Visigoths "forbidding the use of Roman right" into "a general law, as if he wanted to exterminate Roman right throughout the universe." Even as Christian ecclesiastics often opposed Roman right, their legal spirit took on its unitary character.

at least, where it most appears that Montesquieu contrasts Greek and Roman law, he actually contrasts premodern law—including both the Greek and the Roman—with Christianity, which carries a new and foreign legal spirit.

More often, Montesquieu connects the Roman laws to Greek institutions,[54] and is explicit about the provenance of Roman laws from the Greeks. In chapter 13 of book 29, he writes that the "Roman laws on robbery [were] drawn from the Lacedaemonian institutions" and that the latter had received these laws from the Cretans (29.13, 610). But at the end of this chapter he notes that these laws were "foreign" to Rome and did not have a link to its "other civil laws" (611). He presents this as a kind of legislative warning: if one wants to "transfer a civil law from one nation to another," he should make sure it is compatible with the "political right" of the new nation. Here Montesquieu is writing about how these laws exact twice the penalty on those who are caught with stolen goods than on those who manage to hide the goods before having their deed exposed. What is dissimilar is that the Spartan laws wanted to encourage individual cunning and disdain for pain, while the Roman political law was not as concerned with the individual; one's citizenship did not depend on one's individual prowess, but on belonging to Rome.

However, Montesquieu's description of the provenance of the law here reveals that he has considered the connection between Greece and Rome especially through the lens of Plato's *Laws*: he writes, citing "*Laws*, bk. 1," "All this [legislation] came from a more distant past. The Lacedaemonians had drawn these usages from the Cretans, and Plato, who wants to prove that the Cretan institutions were made for war…" (29.13, 610; cf. 29.9). This is especially important for understanding book 27, where Montesquieu describes how Rome

[54] For instance, 29.9, 29.13, and 29.14.

came to deviate from the original spirit of its laws. The original purpose of the "Roman laws on inheritance," Montesquieu writes, was to maintain the original division of lands among the families which received them (27, ¶¶2–3). Consequently, the law did not allow a family's allotment to pass out of existence, or merge into another family. The Roman law limited the ability of an individual citizen to dispose of his own property as he wished, as for instance, in modern liberal democracies one cannot use one's property in such a way as to endanger the life or liberty of another citizen or resident. As the constitution of modern liberal regimes is threatened when individual liberty is insecure, so the constitution of ancient, pre-imperial Rome would be threatened if the maintenance of the public division of lands was insecure (27, ¶11, 522). Ancient republicanism, Montesquieu repeatedly stresses, relies upon an equality of wealth and the rejection of luxury (e.g., 7.2). Rome deviated from its foundational spirit as it became more unequal, and it became more unequal as it became more interested in luxury (27, ¶14, 523).

Plato's *Laws*

This connection between equality of property and the rejection of luxury which characterizes the spirit of early Roman law and which necessitates a restriction of individual liberty in the disposal of one's property is further reminiscent of the regime described in Plato's *Laws*. While it may seem arbitrary to mention this dialogue in the context of Montesquieu's treatment of the developments of Roman law, there is great textual evidence to support the claim that the regime in the *Laws* may have served as Montesquieu's model for his depiction of early Rome, or at least that he had the *Laws* in mind when he describes the spirit of early

Rome.[55] A third possibility, just as difficult to establish conclusively but for which there is plenty of circumstantial evidence, is that Montesquieu conceives of his own activity in describing the revolutions of barbarian law as a kind of philosophic legislation akin to Plato's purpose in writing the *Laws*.

There are many references to Plato's *Laws* in Book 29, and that book ends by calling Plato a legislator—the last of many references to Plato, most of which are to the *Laws*, in the *Spirit* as a whole.[56] In that book, Montesquieu uses Plato both as a source for Greek law and as an example of a legislator, along with other philosophers who did not literally legislate, such as Aristotle, Machiavelli, and More (29.19). Montesquieu also compares himself to Plato at the very beginning of *Spirit*, writing, "Plato thanked heaven that he was born in Socrates' time, and as for me, I am grateful that heaven had me born in the government in which I live and that it wanted me to obey those whom it had me love" (Preface, ¶1).[57] This

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[55] See *Pensées*, 907 for direct evidence that Montesquieu intended a comparison of his "system of liberty" with, among other things, the *Laws*. He names not just the *Laws*, but specifically book 3, which, like *Spirit*, is about the founding of a new regime. At this founding moment the legislator must take into account the pre-existing character and mores of the inhabitants-to-be, and it is this character and these mores which inform the property arrangements. These arrangements are meant to accommodate but moderate the native passions of the people, thus achieving something less than the perfection that would be possible if men were perfectly reasonable, but something much safer and longer lasting than would be accomplished if the legislator were to attempt to effect that perfection. With this suggestion, consider *Pensées*, 1859: "It is a wonderful thought by Plato, [in] *Republic*, book IX, that the laws are made to announce the orders of reason to those who cannot receive it immediately from itself." It is also worth noting that Montesquieu writes that his own system of liberty "will have to be compared with the *other* ancient republics" (*il faudra le comparer avec les* autres *anciennes républiques*, my emphasis, *OC* 1:996, *pensée* 80). Caillois flags this *autres* as an error, but it is at least possible that Montesquieu was thinking of his own "system" as something "ancient," insofar as it was not an invention of his prudence, so much as an adaptation from the (ancient) barbarians, not simply a modern innovation. For the historical background of this *pensée*, see Shackleton, *Montesquieu*, 265.

[56] 29.9, 29.13, 29.16, and 29.19. There are many references to the *Laws* in *Spirit of the Laws*, many more than to the *Republic*. The *Laws* is cited in footnotes or referred to in the text at 4.6, 4.7, 4.8, 5.17, 5.19, 6.8, 6.20, 7.1, 8.11, 15.17, 19.22, 20.1, 20.18, 21.13, 23.17, 24.18, 25.7, 26.3, 29.9, 29.13, 29.16, and 29.19. Montesquieu cites the *Republic* at 4.6, 5.5, 5.19, 7.16, 8.11, and 23.17. Note that once, when referring to the regime described in the *Laws*, Montesquieu calls it "the republic of Plato" (7.1). See *Pensées*, 1378: "One must reflect upon Aristotle's *Politics* and the two *Republics* of Plato [as opposed to "in their historians"], if one wants to have an accurate idea of Greek laws and mores." This source is referenced by Cohler et al. at 96, note a.

[57] See also Preface, ¶1 and *Pensées*, 1233. On Montesquieu's ambiguous self-comparison with Plato, see Warner, "Montesquieu's Address," who shows that by using *remercier* for Plato's thanks, and the much stronger *rendre grâces*, used to give respect to a superior, for his own, Montesquieu indicates both what is different about his

somewhat obscure statement is made a little clearer by Montesquieu's announcement, later in the Preface, of the reasons for his writing: "Each nation will find here the reasons for its maxims and the consequence will naturally be drawn from them that changes can be proposed only by those who are born fortunate enough to fathom by a stroke of genius the whole of a state's constitution" (¶9). At the end of the Preface he identifies himself as one who has not "totally lacked genius" (¶16; cf. 29.16).[58] Perhaps, then, Montesquieu considers himself as one who, like Plato, is fortunate to have been born in an advanced city, have philosophic teachers, and have the genius to understand a state's constitution and propose changes in accordance with it.[59]

Montesquieu does seem to read the *Laws* as a kind of legislative reform. In a chapter on "Greek institutions" in which he refers to "the breadth of genius" of Greek "legislators," he writes, "The laws of Crete were the originals for the laws of Lacedaemonia, and Plato's laws were their correction" (4.6).[60] That this refers to Plato's *Laws* is certain, but it is less

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own situation—"the power of the Catholic Church"—but also, what is the same: that each had to write while taking into account the particular restrictive theological-political environment in which he wrote.

[58] Montesquieu also says he is encouraged by those "great men" who "have written before" him. He ends by writing, giving the Italian in a footnote, "'And I too am a painter,' have I said with Coreggio." While the other writers whose works encourage him are from "France, England, and Germany," this writer is Italian: could Montesquieu be referring to Machiavelli as an inspiration? See 6.5, where Montesquieu calls Machiavelli a "great man"; and *Pensées*, 1937. Cf. Machiavelli, *The Prince*, Epistle Dedicatory, esp. the end of the second paragraph. For more on Montesquieu's connection to Machiavelli in this light, see Warner, "Montesquieu's Address"; Vickie Sullivan, "Against the Despotism of a Republic: Montesquieu's Correction of Machiavelli in the Name of the Security of the Individual," *History of Political Thought* 27, no. 2 (Summer 2006): 268n12; and the section, "Commentary on Machiavelli," in Chapter 2, below.

[59] See 19.5, esp. ¶3; and 21.18: "And does not the greatness of genius consist rather in knowing in which cases there must be uniformity and in which differences?" (See this question with Preface, ¶5.) Most instances of the word 'genius' (*génie*) do not refer to legislators in the ordinary or the philosophic sense, but rather indicate what any given people are particularly good at. Sometimes the word seems to be used interchangeably with 'spirit' (*esprit*), e.g. 6.15, ¶¶2 and 4; and 19.5, ¶3. One understands the connection between these two terms and between the divergent uses of 'genius' through understanding the effect of legislative genius, which by adapting to the qualities and characteristics—or spirits—of specific peoples, allows them to prosper in a particular way: in other words, the legislator gives a people its particular genius.

[60] There is no explicit reference to the *Laws* in the text here, nor is it cited in the footnotes: "*Les lois de Crète étoient l'orignal de celles de Lacédémonde, et celles de Platon en étoient la correction*." It is possible that Montesquieu is hereby indicating not just the writing of Plato, but his overall philosophic-legislative project.

clear what Montesquieu means by Plato's "laws," given that, his Syracusan advisory expeditions aside, he did not participate in legislation. It also requires examination of other passages to see in what Plato's "correction" of Cretan laws consists. Montesquieu goes on to describe, in the chapter just cited, "the breadth of genius of those legislators"—including Plato—to oppose customs and confuse virtues, for instance "larceny" with "justice" (in the case of Lycurgus) and "slavery" with "liberty." That these institutions are almost the polar opposites of those prescribed or at least favored by Montesquieu does not mean he lacks admiration for these legislators; on the contrary, they, as he, 'legislated' with the needs of their particular nations in mind.[61] Montesquieu does go on to cite a couple of modern Lycurguses "in the dregs and corruption of modern times," chiefly pointing out the Jesuits, but his examples are awkward, and seem to show more than anything that the aim of restoring and preserving virtue by limiting commerce is appropriate only for small and primitive republics. If the political rulers rather than the citizens engage in commerce, "[i]n this way commerce does not corrupt the constitution, and the constitution does not deprive the society of the advantages of commerce" (4.6). However, if the constitution and the people are already corrupted, it is entirely inappropriate to restrict commerce. Montesquieu's own most notable philosophic 'legislation,' the encouragement of commerce, is practically the opposite of the laws of the Cretans, Lycurgus, and Plato. Montesquieu defends this by writing, at the end of this first chapter on commerce, "Commerce corrupts pure mores, and this was the subject of Plato's complaints; it polishes and softens barbarian mores, as we see every day" (20.1).

The specific conditions of ancient republicanism, and specifically of those of the

[61] Preface, ¶¶9–13; 1.3, 8 (¶9); 19.5; 29.18.

Dorian peoples—Cretans and Spartans—and Plato's "correction" of their constitution, will be treated later. However, it is sufficient to say for now, in anticipation of a more thorough analysis of book 27, on the Romans, that, as Montesquieu entitles book 5, "the laws given by the legislator should be relative to the principle of each government." As the principle of republicanism differs from the principle of monarchy, so ought the approach to reforming an ancient republic to differ from the approach to reforming a modern monarchy. Montesquieu indicates this when in book 29, entitled, "On the way to compose the laws," he notes that, while ostensibly giving principles for the interpretation, not the creation of laws, one must seek to reconcile "the aims of the legislator" (29.3–5), the "effect" laws will have (29.6–7), any other motives and purposes present during legislation (29.8, 29.13), and the "circumstances in which" laws are to be made (29.14; cf. 29.3, 29.6). The legislator must take all of this into account and compose the laws in a "spirit of moderation" (29.1; cf. 29.10), not trying to effect perfect justice, but rather liberty and security.

Montesquieu's circumstances differ from Plato's in many ways, most notably in that he is dealing with a monarchy, while Plato is concerned with small republics. In one chapter, Montesquieu directly addresses this difference. The chapter concerns a "law of Solon" which compelled great men to get involved in factional debates in the city (29.3).[62] Montesquieu justifies this law on the grounds that in "small states," the majority of citizens were involved in quarrels, while the wisest and most prudent would stick to the sidelines. In this case, the legislator compelled the wisest to get involved in order to moderate the political situation. But the situation is quite reversed in "our great monarchies," Montesquieu notes: a small

[62] See also 29.6, "That laws that appear the same do not always have the same effect," for another example of a difference of circumstances between ancient and modern, and between republican and monarchic regimes, causing the same law to have different effects in different circumstances.

number are involved in politics, while the rest "want to lead a life of inaction" (29.3). He does not draw out the parallel legislative solution, but it would be to get the greatest men out of trying to do great things in politics, while compelling the common people to be more invested. This is achieved through commerce. For Plato in the *Laws*, wealth is an occasion for vice in the individual, and division in the political order, but for Montesquieu, commerce is a way to moderate the vices of the political order itself (21.20).[63]

For Montesquieu, the essence of the constitution, or the political law, is found in its approach to property, or the meaning of property in each regime. In the *Laws*, Plato's Athenian Stranger seeks to make the original property allotments sacred in order to limit inequality, the pursuit of luxury, and abandonment of the public good. Montesquieu, who speaks directly to this purpose in the *Laws*, going so far as to refer to the specific number of the 5,040 allotments to be maintained (23.17, 438; *Laws* 737e), also strives to make individual property sacred, but he does so as a way to limit the tendency of the public desire to promote the good to become despotic in infringing upon the security of the individual. Montesquieu is not ignorant of the negative side effects of moneymaking. He notes that those who cultivate the land and thus have money require more civil laws than those who do not, as they have "new means and… various ways of being wicked" (18.16) and there is greater inequality (18.17), whereas among those who do not cultivate the land "the liberty of the man is so great that it necessarily brings with it the liberty of the citizen" (18.14), and as "each man has few needs… equality… is forced" (18.17). For all the emphasis on commerce

[63] See 29.6 for what seems to be a counter-example. In the republican example, the law is introduced to promote commerce, while in the monarchic example, the law restricts it. However, the republican law is not actually introducing commerce in the modern sense, only promoting the principle of republics (relative equality and friendship between citizens).

for which Montesquieu is famous, the barbarians to whom he looks as a model for the sacredness of property are not cultivators of the land and do not have much money (cf. 18.22, 296). Thus, the guiding question in our analysis of Montesquieu's description of the revolutions of barbarian law in book 28 will be how he hopes to translate the mores of a non-commercial, barbarian people into a commercial context. A crucial difference between Plato's "correction" of Dorian customs and Montesquieu's translation is that while Plato introduces a written law to palliate the immoderation and injustice of the unwritten law, Montesquieu is engaged in a criticism of the written law which has supplanted or confused what he sees as the mostly just and moderate customs of the barbarians.

We will have occasion to treat that criticism in more depth in the next two sections. However, it will also be helpful to refer here to some of Montesquieu's more candid remarks about the differences between the ancient and the modern legislative contexts. He writes in the *Pensées*, after observing the differences of political prescription between the Lutherans and the Calvinists:

> The religious disputes made government no longer a constitution for living according to the laws, but instead a conspiracy of those who thought one way against those who thought another; a type of evil that we owe to our modern times, and on which the ancient men of politics have nothing to tell us.[64]

The modern legislative context is distinct for the importance that religious adherents place upon belief, as opposed to action, upon religious faith as a model for, rather than a support of civic devotion. Even if the cultivation of virtue is Montesquieu's goal as it was Plato's, since the meaning of that virtue has been transformed, so too have been its corresponding vices. It is in light of this fact that we should consider Montesquieu's definition of virtue in

[64] *Pensées*, 917.

his foreword as "*political* virtue" rather than "moral virtue or a Christian virtue," and his explanation that "[he has] had new ideas [and] new words have had to be found or new meanings given to old ones."[65] He has had new ideas and has had to find new words and new meanings not only because Christianity is new, but because the combination of the Christian spirit with the barbarian spirit of laws presents new challenges, new forms of virtue and vice. Plato may have nothing to tell us about the new "type of evil" that Montesquieu confronts, but his example tells much to the prospective philosophic legislator about how one can grapple with the peculiar character of one's people in a "spirit of moderation" (29.1). Montesquieu makes a related point in another *pensée*, one written as a postscript to book 27 and a prescript to book 28: "One must know about ancient matters not in order to change the new ones, but to make good use of the new ones."[66] This remark is not immediately related to philosophic writers, but to "the general opinions of each age," that is, the environment in which those writers operated. Montesquieu writes that one must study how these "dominant opinions" fit into the "framework of reason" not only of the age in which they were dominant, but also "other ages." Then one can use them for "the ardor they inspire" and employ them in a way that "[prevents] them from spreading prejudice for ill." The novelty of the Christian spirit consists not so much in religious opinion as such, but its dominant status, its outsized place within the larger context of the laws. There is no ancient model for the modern problem, but from how the constituent elements relate to each other

[65] Author's foreword, ¶1. Emphasis in original. Cf. Angelo M. Codevilla, "Words and Power," in *The Prince*, Codevilla, trans. (New Haven, CT: Yale University Press, 1997), xxviii–xxxvii, for Machiavelli's own novel use of the word 'virtue.'

[66] *Pensées*, 1795. See Georges Benrekassa, "Philosophie du droit et histoire dans les livres XXVII et XXVIII de *L'Esprit des lois*," in *Le Concentrique et l'Excentrique: marges des Lumières* (Paris: Payot, 1980), 157–62, for an analysis of this *pensée* in light of those books. For Benrekassa's thoughts on the place of these books in *Spirit* as a whole, see also his article, "*L'Esprit des lois*," in *A Montesquieu Dictionary* [online], esp. §15.

in the "framework of reason" that informs "the spirit of [each] time period," Montesquieu can learn how to effect a rearrangement of those elements in his own. He concludes this *pensée* with a remark that relates this study to his own philosophic-legislative project: "Giving men laws has not been a matter of sowing dragons' teeth to get them to emerge from underground." That is, one does not plant them for them to emerge, fully formed in all their relations, but must dig them up and investigate the way they fit into the spirit the laws of each age (cf. 30.1, ¶3), and in so doing find the way to reorient and transform them for a new one. This excavation takes place in part 6, where Montesquieu recounts prior reorientations and transformations, thus enabling him to see the difference between different spirits of law.

To understand how Montesquieu conceives of the innovations in written law which have been added on to, in some cases, and in other cases replaced, the barbarian customs, it is necessary to break down his description of the changes in Roman law, partly attributable to Christianity, and then his description of how that transformed Roman law affected the barbarians. We will turn first to the Romans.

Book 27: Revolutions in Roman Law

While Montesquieu's book on the Romans consists of *Considerations on the Causes of the Grandeur of the Romans and Their Decadence*, or the greatness and decline of Rome generally,[67] his chapter on the Romans in *Spirit* is specifically on "the origin and revolutions of the Roman laws on inheritance" (27, title). This chapter is to serve as a model for the one that follows it. Montesquieu is concerned in book 27 with describing the original spirit of Roman

[67] Montesquieu, *Considerations on the Causes of the Greatness of the Romans and Their Decline*, trans. David Lowenthal. (Indianapolis: Hackett, 1999). Cited hereafter as '*Romans*.'

law and the changes it underwent; similarly, his plan for the treatment of European law in book 28 is to reveal its original spirit so that he may translate it for new conditions, not to bring in essentialist values of justice and judge the degree to which the present legal situation conforms to what is best. He will not write a 'decline and fall of French law' or a consideration on the causes of the greatness of Europe and its decline. He will merely describe, historically, the revolutions which the French or European law has undergone. This is consistent with Montesquieu's rhetorical profession of 'showing' the laws and tracing them to their source, leading to a new French rhetorical self-understanding without directly criticizing the existing law.

It may reasonably be asked why it is necessary to preface the long treatment of French civil law in book 28 with the relatively brief treatment of Roman [political] law in book 27. The answer is that in order to untangle the different spirits present in the French law, Montesquieu must find their source beyond French law in the Roman. In order to distinguish what is Roman and what is Christian or barbarian, he must first trace Roman law back to its source.

The thread tying French law to Roman law is the question of "inheritance." The French word *successions* is rightly so translated, but the political connotations of its English cognate are not absent from the French, and are helpful for understanding Montesquieu's purpose in both books 27 and 28. Inheritance is about property, and property is tied with one's membership in the political order (26.16, ¶2). The distinct spirits of the law reflect different understandings of property, and thus different understandings of the meaning of political order. Consequently, in order to make clear, in book 28, the problem with the eventual French conflation of inheritance of property and succession of political rule and

judicial right, Montesquieu needs to differentiate between the Roman and French, or barbarian spirits of the law. Only if he starts by finding the origin of Roman law on inheritance and distinguishes the original Roman spirit from the later revolutions can he separate out from the original spirit of barbarian law its later, Roman/Christian-influenced revolutions.

Montesquieu begins Book 27 with the claim that he has in fact traced Roman laws to their source, and seen in them "something… no one has seen there before" (¶1).[68] He identifies as the principle behind Roman laws the original division of lands and the legislator's wish that those allotments be maintained (¶¶2–3). This principle of division and maintenance of the division does not seem to be original with Romulus, although Montesquieu does not say that here (cf. ¶9); it was borrowed from the Dorian Greeks (23.17, 29.13). When it comes to comparison with the Germanic barbarians and their customs, the Romans represent a distinct spirit, but elsewhere, the Romans and Greeks together constitute the spirit of premodern law. Romulus is absent from Montesquieu's brief catalogue of "legislators" at the end of Book 29, where legislation is presented as a kind of coloring or adaptation of preexisting laws rather than a creation of new laws out of nothing. Montesquieu's legislators are all writers, and Romulus was not a writer. Consequently, the adaptation of Dorian customs for the Roman people was not always consistent or sensible (29.13, end). We often find this in Montesquieu's analysis, as "revolutions" occur naturally through the movement of peoples and other historical causes, but changes to laws can only be made "by those who are born fortunate enough to fathom by a stroke of genius the

[68] See also *Pensées*, 1770: "I am going to treat the relationship that political laws have with civil laws, which is something that I'm not aware anyone has done before me."

whole of a state's constitution" (Preface, ¶9), and such men are rare. The division of lands, similar as it is to Plato's "correction" of the Dorian institutions, is not such a revolution, but is Rome's "constitution." All subsequent laws are to be judged in the light of that constitution and its spirit: it is the principle which allows us to distinguish between an authentically Roman law, and one that is an innovation, or revolution, which has a different spirit.

Montesquieu's discovery about the Roman laws is that the maintenance of the "division of lands" explains all the Roman property laws, including the cases in which a woman may or may not inherit (¶8). Subsequent laws can be judged as revolutionary, and hence originating from a different spirit, inasmuch as they differ from this principle. The laws on inheritance relate to the original division as subsidiary laws to a fundamental "constitution" (¶9). Montesquieu writes that "the order of inheritance was established as a consequence of political law" (¶11); the political law is the constitution, or the fundamental law (book 11); the maintenance and preservation of that constitution in relation to individual citizens is civil law (book 12). We will explore this distinction more in Chapters 2 and 3, especially in connection to liberty, the theme of part 2. For now, we are concerned with how Montesquieu sets up in book 27 a contrast between the Romans and the French laws on inheritance and their connection to the constitution.

For the Romans, there is no question of the separation of inheritance of property and of political rule: one's inheritance of property is an inheritance of political rule; one inherits, in a sense, the original constitutional division of lands. Thus, inheritance is not a private or personal matter; one cannot dispose of his property as he likes: "a citizen was not to disturb [the political law] by the will of an individual" (¶11) through testaments, and if one did need

to "dispose of one's goods," he did it in "an assembly of the people"—"each testament was, in a way, an act of legislative power" (¶12; see ¶19).

This principle was at war in Rome with another, more natural principle: the power of the father over his children and thus the power the father has to deny his children their inheritance and name another heir (¶13). Montesquieu identifies the original division of lands and the restriction of testaments as the original principle of the Roman constitution even as he acknowledges that there was in reality "indefinite permission to make testaments," and that this permission "introduced the ominous difference between wealth and poverty" (¶14). As with the Dorians in Plato's *Laws*, the purpose of the Romans' division of lands, according to Montesquieu, was to limit the ways in which the personal attachments and private lives of individuals tend to threaten the equality, public-spiritedness, and virtue which is the essence of republicanism (4.5). Far from being an extension of one's own person, which one may do with as one wills, for the Romans property is a limitation on one's will: a testament, then, is not "an "expression[] of the will of the one who contracts" (¶20); it is an expression of the public, an act of "political right" which is consistent with the limitation of individual wills (¶19; see ¶¶11–12). Just as fathers must be prevented from disinheriting their sons, in certain cases, later in Roman history, fathers had to be prevented from giving inheritances to their daughters. Montesquieu writes, in this context, "The law sacrificed both the citizen and the man and thought only of the republic" (¶36).

While it may seem very anti-Montesquieuean to pit the man against the republic, and one's desire to help oneself and one's family against one's country, especially in terms of restricting commerce and the free flow of property (cf. 21.20, ¶1), Montesquieu's own promotion of commerce is a kind of law which in a certain sense, seems to harm the man

and help the society: the commercial republican regime, by preventing pious cruelty, may harm the man in the attenuated sense that he lives in a regime that deemphasizes moral virtue. On the Romans, Montesquieu writes that "the statutes of legislators regard the society more than the citizen, and the citizen more than the man…. It is not impossible that the legislator had fulfilled a great part of his purpose when his law was such that it forced only honest people to evade it." (¶36). If it is right that Montesquieu considers himself a kind of legislator, then his own legislation could be understood in this light such that the "honest people" who "evade" the law are those who do not fully replace concern for higher things with commerce. The "'law" here evaded would be that matters of belief are out of the power of government, and consequently, that such matters should be forgotten (25.12). However, while it is certainly true that Montesquieu acknowledges that commerce is connected to impure mores, he promotes and celebrates it as a way to soften the cruelty he associates with Christian monarchs (21.20), that is, not to favor the society at the expense of the man, but to favor the citizen at the expense of the perceived good of the despotic ruler (21.20, ¶10).

The first revolution in the Roman law, as distinguished from the original sin of the Law of Twelve Tables (¶13), was the Voconian law. This was a sumptuary law, supported by Cato the Elder during the Punic Wars, which limited the inheritance of women in order to check the pernicious effects of wealth and luxury (¶¶23, 26, 28). Montesquieu describes this as a kind of correction of the original division of lands, which "did not sufficiently restrict the wealth of women and thereby left a door open to luxury" (¶23). This correction led to a further corruption of the original principles of Roman citizenship, as the wealthiest Romans would decline to enroll in the census, thus "consent[ing] to suffer the shame of mingling in the sixth class with the proletarians" in order to be able to pass inheritances to their

daughters (¶33). Depopulation from the wars, and the further crippling effect that luxury had on marriage and fecundity, then incited the Papian law (¶38), which eased restrictions on inheritances for women with more than two children, and in other cases (¶40). Montesquieu's description of depopulation under "the monarchy" (¶44) echoes his own concerns for France and Europe generally.[69] One might wonder, since he connects wealth and luxury to depopulation and loss of civic virtue, why he promotes commerce in the modern context. However, Montesquieu has shown in part 4 that the Roman commerce was a commerce of luxury, consequent on their imperial ambitions and serving to promote vice and despotism, and fundamentally different from the economic commerce of the modern republics, which promotes peaceful virtues, and contra Aristotle, discourages tyranny.[70]

At the end of book 27, only at the very end of the penultimate paragraph, Montesquieu subtly introduces the effect of Christianity on inheritance laws. In that paragraph, he describes the erosions of the Voconian Law under the empire. With the Papian Law, exceptions were made for women with children; further exceptions came later. The Voconian law was meant to restrict luxury, the Papian law to promote marriage and childbirth. "Finally," Montesquieu writes, "Justinian granted [women] inheritances independently of the number of children they had" (¶43). Justinian, along with his predecessors Valentinian, Theodosius, Arcadius, and Honorius, three of whom are mentioned in the final paragraph, often represent for Montesquieu the effects of

[69] See book 23, "On laws in their relation to the number of inhabitants," generally, and specifically, 23.21, 448 and 23.24–29.

[70] Montesquieu establishes this distinction over the course of books 20–21, first at 20.4. On the ancient and Roman commerce of luxury, see 21.6–7, 21.13–16, and *Romans*, chapter 10. On economic commerce, see 20.5–12 and esp. 21.4, 21.11, and 21.20. On this distinction, see Andrew Scott Bibby, *Montesquieu's Political Economy* (New York: Palgrave Macmillan, 2016), 39–41, and for further scholarship on the distinction, 167n32.

Christianity, in particular, on Roman law and mores.[71] However, the description here is simply historical, and the change or revolution is not ascribed to any foreign or competing spirit. It is hard to see the changes Montesquieu describes as anything else but the adaptation and transformation of inheritance laws for the needs of different political situations. It isn't until the last sentence, in fact, that we really see what he is getting at.

The last paragraph summarizes the revolutions in inheritance law: the limitations on female inheritance, "very much in conformity with the spirit of a good republic," were undermined by the need to encourage marriage under the monarchy. However, the effects of the monarchy went further than rendering nugatory the Voconian Law; they destroyed the principle of the division of the lands, which "hampered inheritance through relatives on the woman's side," as well. After naming Christian emperors who "summoned the grandchildren by the daughter to the inheritance of the grandfather," Montesquieu writes, "Finally, the emperor Justinian removed the slightest trace of the old right about inheritances…. He believed he followed nature itself, when he set aside what he called the encumbrances of the old jurisprudence" (¶44). This final revolution, presented as a continuation of the invitation to marriage made necessary because of "the luxury of monarchy," introduces a contrary and distinct principle, "nature itself," which in characteristic Montesquieuan fashion, is unexplained. We must recur to the previous book, "On the laws in they relation they should have with the order of things upon which they are to enact" (book 26, title) to see that it is Christianity that is thereby indicated. Chapter 6 of that book is entitled, "That the order of inheritance depends on principles of political or civil

[71] See esp. 23.21, 448, where Montesquieu is most candid about this connection, writing, "Christianity gave its character to jurisprudence, for empire always has some relation to priesthood. This can be seen in the Theodosian Code, which is but a compilation of the ordinances of the Christian emperors."

right, and not on principles of natural right." It begins:

> The Voconian law did not permit one to appoint a woman heir, not even one's only daughter. "There never was," says Saint Augustine, "a more unjust law." A formula of Marculf terms impious that custom which deprives daughters of their father's inheritance. Justinian calls the right of inheritance for males to the detriment of daughters barbarous. These ideas come from regarding the right of children to inherit from their fathers to be a consequence of natural law, which it is not. (26.6, ¶1)

Montesquieu does not ascribe these authors' view to their Christianity, but they are all Christian authors arguing from Christian natural law. Montesquieu contends in this chapter that "feeding one's children is an obligation of natural right," but "giving them one's inheritance is an obligation of civil or political right" (26.6, 500). This principle is consistent with the teaching that the understanding of property belongs to the constitution of each people: property may be that by which one is a ruler, either as a citizen, or as a man, but rule needs to be constituted, and the order of its succession must be determined by the principle of each constitution. That Montesquieu is concerned primarily with inheritance of *rule*, not merely of personal goods, is made evident by his choice of examples in this chapter, practically all of which are about principles of succession. We see later, in book 31, that Montesquieu has in his sights the very principle of succession in the French monarchy, where a new king inherits property, rule, and the administration of justice, all without any obligation to the people (see esp. 31.8 and 31.32–34).

Montesquieu's purpose in book 27 is, first, to create a model for his analysis of the French or barbarian laws:[72] he finds the true principle, or the "origin," and shows how it has been obscured, or transformed, by later innovations, or "revolutions." Second, despite his conflation of the two terms elsewhere, he wishes to distinguish between political and civil

[72] Montesquieu says as much in *Pensées*, 1794.

laws (cf. ¶¶11, 19, 36 with 28, title). He shows how the original spirit of Roman law is changed by Christianity, which does not see inheritance as connected to the political law: it's a wholly private civil matter which is determined by natural law. Third, with his presentation of the revolutions of Roman law he is able to conflate the Roman spirit with the spirit of Christianity, so that when he writes on the changes in the barbarian laws after coming into contact with the Roman law, he is not directly attributing what he sees as harmful effects to Christianity, but to Roman law.

Book 28: Revolutions in French Civil Law

Book 28 is much longer and more complicated than book 27, but its revolutions take a similar course, in that the law becomes increasingly Christian. Montesquieu focuses in the earlier parts of the book on Germanic customs; at the end, on ecclesiastical right. Throughout the book, he draws broad contrasts and important distinctions between pecuniary and corporal penalties, between personal and universal law, and between the Salic barbarians and the Visigoths and Burgundians who lived in the former Roman lands and in large part adopted the laws of those they conquered; in each case, he speaks more favorably of the first term than the second. Montesquieu's purpose in this account is to recover the Germanic or barbarian spirit of law and distinguish it from the Roman and Christian. Though he wishes to reinvigorate this barbarian spirit, he is not necessarily interested in every case with weakening the Roman or Christian; rather, he wishes to show how these spirits combine in ways that are contrary to our interests and that restrict, rather than promote, liberty.

Montesquieu's historical account is, in the sense described above, legislative, but he is

also restricted by the actual progress of history and his own professed project of "showing" the original spirit of the laws rather than making an argument, with historical evidence as a secondary consideration. Nevertheless, the account does divide into several discernible moments which describe conflicts between the spirits outlined above: the Germanic, the Roman, and the Christian.

1) In chapters 1–8, Montesquieu distinguishes between the Germanic and the Roman spirits by describing the difference between Germanic tribes: some, whose laws are pecuniary and partial, distinguishing between Germans and Romans, and others, like the Visigoths and Burgundians, who lived in former Roman lands and whose laws tended to be impartial and involve more corporal, and fewer pecuniary penalties. 2) In chapters 9–12, Montesquieu describes the historical period where the barbarian customs which had been written down upon contact with the Romans and the Latin language, passed into obscurity but continued to be observed as unwritten customs, while a more Christian spirit began to rule written law and rule, and fiefs became heritable.[73] 3) Chapters 13–28 are about different kinds of legal proofs: the Salic law allows for witnesses, but also uses cruel physical proofs, while the Visigoths and Burgundians use negative proof (oaths of denial) and judicial combat. Here, Montesquieu shows a conflict between the Germanic spirit, which is consistent with painful proofs (though not corporal penalties) but is inconsistent with oaths, or negative proofs, and the Christian spirit, which is inconsistent with physical trials but

[73] For more on this period, and for a study of the barbarian law codes, the exercise of judicial power by local lords, and the relation of these to Roman law, see Patrick Wormald, "The *Leges Barbarorum*: Law and Ethnicity in the Post-Roman West," in *Regna and Gentes: The Relationship between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World*, ed. H.-W. Goetz, J. Jarnut, and W. Pohle (Boston: Brill, 2003), 21–53. In this very clear survey, Wormald argues that the purpose of written barbarian law was to maintain an ethnic identity. He speculates that it was a cultural marker to have a written *lex*, but that most legal proceedings, especially concerning transfer of property, took place according to Roman law.

consistent with oaths. 4) The topic of chapters 29–40 is St. Louis' *Establishments*, which attempted to establish a kind of truce or conciliation between the Germanic and Roman-Christian legal spirits, but instead, bolstered by the rediscovery of Justinian's *Digests*, ushered in a spirit of universalization and professionalization of law which nevertheless failed to see the eradication of the old barbarian corporal proofs. 5) Finally, chapters 41–45 describe a kind of tragic conclusion which sees the downfall of the peers' judicial clout, the rise of ecclesiastical-inspired civil right, and the extension of corporal proofs in support of oaths. The history of these three spirits culminates not in a harmonious union in which the hard edges of each have been softened, but in a hideous combination which emphasizes their aspects most susceptible to abuse: the physical cruelty of the barbarians, the combination of political and civil right under the Romans, and the concern for oaths and belief that characterizes Christianity combine in the monstrous despotism of the Inquisition.

Chapter 45 is a summary of the revolutions of French civil law, bringing together the thematic accounts of the previous chapters in a historical account. In it, Montesquieu returns to the antagonism between the German and Roman spirits, arguing that they have become far more entwined than previously thought, and that where previously there was diversity of jurisprudence, now there is a more general and authoritative one (28.45, 601). He does not mention Christianity at all in this final chapter, yet what he means here by "Roman right" is the ultimate Christian-Roman stage of the revolutions of Roman law described in Book 27: the rebirth of Roman right was brought about by the twelfth century rediscovery of the *Digests* of Justinian (28.42, 596), and "canonical right…worked together" with this "new civil right" "to abolish the peers"—that is, the old civil right of the local lords who governed by

personal, barbarian law (28.42, 597).[74] However, the abolition of the peers is not yet the complete centralization of administration described by Tocqueville;[75] it is a rather a professionalization of the administration of justice.[76] The abuses of canonical or ecclesiastical right increased the power of local *parlements*, exercising royal authority, often to limit canonical right (28.40–42). Yet this increase of royal authority, or in other words, the expansion of the power of the French monarchy, while it reined in errant ecclesiastical courts, was detrimental, ultimately, for individual liberty, destroying the old notion of property which was defended in the traditional courts of the barons exercising judicial supervision not as legal experts appointed by the crown, but as the privilege of local nobility, a privilege with pecuniary benefits granted in exchange for the maintenance of the peace.

Montesquieu's purpose in presenting this complicated history is to demonstrate the tensions of the three spirits of the law as they come together in medieval Europe, thus preparing the way to his reorganization and reorientation of the three through an adaptation of the barbarian idea of property for a Christian context. The principles for that reorientation are presented in Book 29, the material of it in Book 30. Book 28, however, shows the difficulties: Christianity's stress on universality, natural law, and belief are at odds with the German spirit, which is partial, favoring members of one's own nation to Romans

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[74] Note that canonical right is distinct from Roman right. See 28.40.

[75] *Democracy in America*, 1.1.5, "On the Political Effects of Administrative Decentralization in the United States," 82–93. See also Tocqueville's *The Old Regime and the Revolution*, ed. François Furet and Françoise Mélonio, trans. Alan S. Kahan (Chicago: University of Chicago Press, 1998), 2.2 and 3.7, esp. 235.

[76] See Tocqueville, *Old Regime*, 2.5. For Montesquieu's influence on Tocqueville, especially in regard to the Romans, see his letter to Kergorlay, December 15, 1850, in *The Two Tocquevilles, Father and Son: Hervé and Alexis de Tocqueville on the Coming of the French Revolution*, R.R. Palmer, ed. (Princeton: Princeton University Press, 1987), 228. For more on Tocqueville's indebtedness to Montesquieu for his treatment of feudal law and the French monarchy in *Spirit*, and the reflection of this influence in *Old Regime*, see my "Tocqueville's Christian Revolution: Christianity's Role in Roman Law, Feudalism, Absolute Monarchy, the Democratic Revolution, and the Future of Democracy," unpublished draft, last edited September 2017, https://www.academia.edu/30594004/.

or others, tends to stress political right over natural law, for instance in favoring succession by adoption rather than succession by birth (see 18.28), and is much more concerned with rites of worship than with the profession of belief. However, the Christian stress on universality, natural law, and belief only becomes despotic when combined with the Roman legal spirit, which conflates what the barbarian would separate, namely political law and civil law, or citizenship and property. As we saw in Book 27, in the Roman constitution the individual's property is of fundamental interest to the state, and his inheritance needs to be controlled. When this is combined with the Christian spirit in the German context, it means that inheritance not just of property but of rule is determined in accordance with natural law, and carries with it a concern for orthodoxy. When barbarian cruelty is added, which in the barbarian context is meant to rectify a private harm and has a definite end, but in the Christian context rectifies a crime against the public and does not have a clear end, one gets the Inquisition (28.1, 534).

Note on Books 30–31

Through our reading of books 27, 28, and 29, we have been able to see the barbarian spirit, the Roman spirit, and the Christian spirit separately, and in concert. In what follows, we will be in a position to distinguish their moments of distinction and combination in the five preceding parts of the work. This would also be possible for books 30 and 31, on the origins and revolutions of the French monarchy. However, besides an account of two chapters in book 30, this examination is unnecessary for our purposes, and would distract from a thematic treatment of the barbarian spirit, property, and privacy of conscience in the work as a whole.

Nevertheless, it would be helpful here, before turning to a closer look at the Salic Law, to identify the moment of legal-spiritual combination most significant for understanding the meaning of the French monarchy. Just as books 27 and 28 were each books on the "origin" and "revolutions" of law for a particular people, books 30–31 are about the "establishment" and "revolutions" of the French monarchy. It is important to note, however, that the titles of both books 30 and 31 begin with "*Théorie des lois féodales chez les francs dans le rapport qu'elles ont avec*…."[77] Neither book 27 nor book 28 is called a "theory," and here the law dealt with is not really the French, but the feudal laws. Montesquieu emphasizes the root meaning of the word "theory": "one will find here the laws as I have come to *view* them rather than as I have dealt with them"; "The *spectacle* of the feudal laws is a fine one" (30.1, ¶¶2–3).[78] Further, Montesquieu gives here the image of an old oak tree whose roots must be dug up, exposed. His own excavation of feudal law allows us to "perceive the roots" (30.1, ¶3); in other words, the "theory" is our beholding of the result of his investigation. Books 30 and 31 are more appendix-like than 27 and 28, but they are nevertheless a culmination and an exhibition of what Montesquieu has accomplished throughout the book, beginning with the distinction between the barbarian, Roman, and Christian spirits he accomplished first in the first two books of part 6. Books 30 and 31 are on the feudal laws, but before these come into view on their own, Montesquieu treats their "sources" (30.2, title): the "mores" of the barbarians, as can be seen both in their law codes and in the works of Tacitus and Caesar (¶¶1–3). He goes so far as to say that "if in the search for the feudal laws I find myself in a dark labyrinth full of paths and detours, I believe that I hold the end of the thread and that I

[77] *OC* 2:883, 937.
[78] Emphasis added. The Greek word *theoria* is derived from a verb meaning 'to look' or 'to see.'

can walk" (¶4). The thread is the barbarian mores; they are what allow Montesquieu to see the meaning of the laws establishing and transforming the French monarchy, long after the barbarian peoples had ceased to exist.

We expect, then, that Montesquieu's treatment of the French monarchy will have something to do with the meeting of the barbarians and the Romans. Through all the complicated historical paths and detours of the 59 chapters of these two books, this is the thread the reader must hold onto. The principle of the French monarchy is but one meeting of spirits, and not, for the modern reader, the most important one, and thus it will not be treated extensively here. It will suffice to summarize it.

The Germanic barbarians choose their kings based on strength and merit, and did not have inheritance of rule, or succession. Among them, property was inherited by all children in common. However, the Roman principle, in order to maintain the number of households, is primogeniture, inheritance by the oldest son only, and with inheritance of property comes a notion of the inheritance of political rights. When the Franks conquered Gaul and their law mixed with the Roman, there was a problem: too much division of land meant smaller and smaller landholdings, and fewer men to help enforce judicial settlements. Instead of division, primogeniture was adopted (31.33). Instead of fiefs getting smaller, they got bigger, and as the one with the biggest fief would have the strongest army, and barbarians choose their kings based on strength, eventually the owner of the biggest fief, rather than the man with the most individual strength and merit, came to be the king (31.32) The principle of succession came to be hereditary, the heir the oldest son of the king. Initially, this kingship was titular and ceremonial, and the barbarian practice of following the best and strongest was maintained with the position of the mayor of the palace (31.16), but Pepin united the

power of the mayor with the title of king (in 751). While kingship was not yet a hereditary office, members of the same family were nevertheless continually chosen. That changed when Hugh Capet became king (in 987): "When Pepin was crowned king, the title of king was united to the greatest office; when Hugh Capet was crowned, the title of king was united to the greatest fief" (31.16, 695), and thus not only fiefs, but the monarchy itself, became hereditary.[79]

This final result is a conflation of political law and civil law in the highest degree, and as the end of Montesquieu's work serves as a closing declaration that the French monarchy is despotic. Fiefs "could be given, sold, or given as legacies, and they belonged to both the political and civil laws." As part of political law, fiefs obligated one to "military service"; as part of civil law, fiefs were regulated "as a kind of good in commerce" (31.34). Montesquieu closes the book by showing that this result is "in spite of Roman right and the Salic law"; it is a monstrous new form. The important distinction between the revocable fief and the perpetual fief is that as the former are revocable, they are always given to those who are capable of serving as vassals, and who have made themselves worthy by their own efforts (31.33), while the latter require a special concern on the part of the lord or the king for marriages any heir may enter, since his or her children may inherit, and for any commerce he transacts, since it may affect his ability to serve capably as vassal. Montesquieu seems to end with an arcane and obscure point, but in fact ends with a distinction between a still limited government, rooted in the strength of its members, and a despotic one, where all life, all

[79] For an excellent summary, by an international relations scholar, of the contact between the barbarian and Roman legal spirits under feudal law—although not put in those terms—in the context of Montesquieu as a theorist who contributes the requirement of "territoriality" to the notion of national sovereignty, see Ben Holland, "Sovereignty as Dominium?: Reconstructing the Constructivist Roman Law Thesis," *International Studies Quarterly* 54, no. 2 (June 2010): 466–69.

commerce, and all strength comes from the king.

The Salic Law

Before we turn again to the beginning of the book, to see how Montesquieu's focus on liberty and his account of the separation of judicial power in the English constitution emerges out of his understanding of the barbarian spirit, it will be helpful to close this chapter with a note on the Salic Law. Throughout the historical presentation of book 28, the Salic law is the most favorably described of the barbarian laws: it, most of all, favors pecuniary rather than corporal penalties—though it does have corporal proofs (e.g. 28.16)—and least of all uses the negative proofs that carry with them the use of trials by combat (28.15, 28.18). The Salic law represents the Germanic law that is least corrupted, or altered, by the Roman and the Christian legal spirits (28.3, 28.12). By Book 28, it has already been treated extensively by Montesquieu (in book 18), but he will return to it in Book 30 to connect the barbarian idea of property to his definition of liberty as the opinion of security (e.g., 30.20, 651).

Book 18 established that the customs of the Salic peoples—barbarians who do not cultivate the land but are rather pastoral, moving from place to place with their herds—are more like mores than laws (18.13). Mores, Montesquieu says, regulate the actions of the man, not those of the citizen (19.16), but mores act in place of the laws; they are pre-political customs that govern people who do not need extensive civil laws. Thus, when Montesquieu describes the origin and revolutions of French civil laws in book 28, by describing the revolutions he is already describing deviations from the spirit of the Germans, but by describing the origin he is describing the real foundation, or principle, behind Germanic law.

As these mores become written, they only enshrine prevailing customs (28.11, 546); they have their roots in a sense of the sacred (30.19, 650). Montesquieu mentions this especially in the context of personal security from the right of vengeance (30.20). That security is maintained through property; property for the Salic Germans was not cultivated land, but the "land around the house" (18.22), not just as a sign of one's membership in the political order, but as a guarantee of one's security. This kind of property became conflated in French law with fiefs, which are not held as a consequence of political law, but are revocable titles of honor which carry with them a responsibility to regulate civil right, and the privilege of collecting judicial penalties (30.16–17). The form of property represented by the Salic enclosure is a sign of the individual's liberty. Among Germanic barbarians, Montesquieu argues, the political law becomes a civil right though the property granted to free men (18.12), and thus the liberty of the man—his original liberty, what other Enlightenment philosophers would call his liberty in the state of nature—becomes the liberty of the citizen (18.14).[80]

In other words, what is called "natural right" by Hobbes and Locke is in a sense the discovery, Montesquieu shows, of a particular people. Behind that discovery is a pre-political sense of the sacred. The civil law of these barbarians was always backed by mores; even as they lived under different political laws, they retained their basic, customary sense of self-ownership and security in their particular customs, what Montesquieu calls "personal laws" (28.2, 28.12). The allodial land given to free men (book 30), the Salic enclosure which ensures one's security (book 18), and this civil right which encoded the customs—rooted in the sense of self-ownership—of each people (book 28) describe what we will here

[80] The discussion of the Salic Law continues in Chapter 3, "Book 18: The Salic Enclosure," below.

characterize as a 'historically-based natural right.' Montesquieu occupies a space in between the natural law of Hobbes[81] and Locke and the philosophy of freedom in Rousseau: there is a natural standard of justice, but it must be embodied in the spirit of a people, not only at the origin of the laws but continually; it must, for new conditions, be rediscovered and translated by philosopher-legislators.[82] Rousseau's own "legislator," or "lawgiver,"[83] more thoroughly denatures man than Montesquieu's, but the principle is similar: the legislator is the source of the understanding of nature that underlies what Rousseau calls the general will, but what Montesquieu calls the spirit of the law.[84]

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[81] One might consider Thomas Hobbes's *A Dialogue between a Philosopher and A Student of the Common Laws of England*, ed. Joseph Cropsey (Chicago: The University of Chicago Press, 1971). As Cropsey notes, however, the *Dialogue* "is to some extent a polemic against [Sir Edward] Coke," the representative of common law, who is represented in the dialogue itself as a lawyer, or in the title of the book, as "a student of the common law," and opposed to the "philosopher," the representative of Hobbes and Bacon (Introduction, 10–15).

[82] The tension between nature and history, or the barbarians as a mythical, even utopian natural condition which retains its "genius" as a people even upon contact and mixture with the Romans, is a central theme of Benrekassa's "Philosophie du Droit et Histoire." See esp. p. 161. Benrekassa, however, reads Montesquieu as a proto-Hegelian who in describing the general spirit of the laws does not act as a legislator, but as a philosophic historian who comes to understand the relation of things in their "totality," and who thereby understands the unfolding of history as a necessary process, the barbarians the seed of Freedom that unfolds and grows through History (162–63, 165, 175–77). Benrekassa is correct, of course, to see a philosophic purpose in Montesquieu's historical books, but reads far too much into Montesquieu's use of the Germans and Romans as distinct spirits. The difference between Benrekassa's argument and mine is that he finds in Montesquieu a process of Reason in History, and I find the process of reason in Montesquieu's history.

[83] Rousseau, *Social Contract*, 2.7.

[84] See *Spirit*, 29.19 with Rousseau, *Social Contract*, 2.12, and Strauss, *Natural Right and History*, 286–88 and 286n56. Strauss mentions in the footnote, which suggests that one compare *Social Contract* 2.12 "with the parallels in Hobbes, Locke, and Montesquieu," that Rousseau "does not even mention natural law." In the text to which this footnote is appended, Strauss writes that for Rousseau, "general will has taken the place of the natural law"; the subsequent argument then suggests that the legislator is the author of that will, and further suggests, although more obliquely, that Rousseau acts as just such a legislator through his writing. It is important to note that Montesquieu actually uses the phrase 'general will' (*volonté générale*) at 11.6, 157–58, to describe the legislative as opposed to the judicial power, and that earlier works, for instance, his *Traité des devoirs*, bear the marks of its provenance (see esp. *OC* 1:109). See Patrick Riley, "The General Will before Rousseau," *Political Theory* 6, no. 4 (November 1978): 495–501, 508, who shows that 'general will' was a term of theology and soteriology, describing the grace of God, which was adapted by Malebranche as a critique of Hobbes' doctrine of sovereignty, before being totally secularized by Montesquieu as the citizens' will. Rousseau's use of the term is much more comprehensive than Montesquieu's, but the core meaning is the same; Montesquieu's analogously comprehensive term is "the spirit of the law."

CHAPTER 2: SEPARATION OF POWERS

From Part 1 to Part 2

The first part of *Spirit* is superficially rooted in the language of classical political philosophy, in that it distinguishes between types of regimes according to the number of rulers and whether a sole ruler governs without law.[85] This is somewhat curious, as Hobbes and Locke had both deemphasized such distinctions. Hobbes wrote in his *De Cive* that his preference for monarchy is the one part of his thought that is merely a preference, and not a consequence of his science, or his system.[86] The logic of his political science is the same whether there is one ruler or many, although Hobbes uses monarchy as the default case because it is easier to distinguish between the people and the sovereign in the case where the people are not also sovereign.[87] Locke, for his part, is thoroughly republican; even as he acknowledges the possible legitimacy of a monarchical commonwealth, the legitimacy of that monarch is underwritten by the majority of the community.[88] However, for both Hobbes and Locke it is the formal elements that make the regime: rule by consent emerging out of the state of nature.[89] Hobbes mocks the moral philosophers of antiquity for distinguishing between regimes according to accidental qualities, chiefly the virtues and vices of the rulers. He rejects Aristotle's crucial distinction between good and bad regimes, which he

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[85] Book 2, "On laws deriving directly from the nature of the government."
[86] Hobbes, *De Cive*, translation attributed to Hobbes, "Author's Preface to the Reader," in *Man and Citizen ("De Homine" and "De Cive")*, ed. Bernard Gert (Indianapolis: Hackett, 1991), 104.
[87] Hobbes, *Leviathan*, 18.4, 19.3, 21.9. The numbers after the period in these references denote the section numbers found in *Leviathan, with selected variants from the Latin edition of 1668*, ed. Edwin Curley (Indianapolis, Hackett, 1994).
[88] Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980), 8.96, 10.132 (references to chapter and section numbers).
[89] *Leviathan*, 13.14, 14.5–7, 17.13; *Second Treatise*, 8.95.

distinguished according to whether the ruling group ruled for the common good, or their own private interest, as inflammatory and practically meaningless.[90]

Montesquieu, for his part, distinguishes between regimes not so much according to the number or virtues of the rulers, but the animating passions of each. He treats the relation between rulers and ruled less than the environment that affects both, and informs the behavior of all, whether it is virtue, as in republics, honor, as in monarchies, or fear, as in despotisms.[91] Although these principles are familiar to the ancient world as the material of political orders, Montesquieu writes of them in a very modern way, largely indistinguishable from Hobbes or Machiavelli. Nevertheless, his classification of regimes had enough of the patina of ancient moral and political philosophy that his friends and contemporaries criticized him for it, along with his teaching on the separation of powers, as arbitrary, distracting, and overly generous to illiberal regimes and principles.[92] Tocqueville, after him, criticized Montesquieu for raising despotism to the status of a regime, and contrasting it with monarchy, and for his own part only identified two "social states": aristocracy and democracy, the former doomed to eventual oblivion and the latter the inevitable social monostate.[93] Jefferson, too, was a great critic of Montesquieu on the grounds that he raised monarchy and despotism, unduly, to statuses of equal legitimacy with democracy.[94]

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[90] *Leviathan*, 46.11, 46.32, 46.35–36. Cf. Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Genesis* (Chicago: University of Chicago Press, 1952), 34–35. Montesquieu, in his *Pensées*, esp. 21, 410, and 799, also criticizes Plato and Aristotle for failing to distinguish properly, in both metaphysics and politics, between accidental and essential qualities. In 799, he writes, "The same error permeated the Greeks' whole philosophy; what made for bad science made for bad moral philosophy, bad metaphysics. It is that they did not see the difference that exists between positive and relative qualities." See also 30, 391, and 1321. However, Montesquieu distinguishes, as Hobbes does not, between monarchies and tyrannies, between the rule of law and the rule of men: *Spirit*, 2.1; *Leviathan*, 46.35–36, 19.2.

[91] Book 3, "On the principles of the three governments."

[92] See the letter to Montesquieu attributed to Helvetius in Destutt de Tracy, *A Commentary and Review of Montesquieu's "Spirit of Laws,"* trans. Thomas Jefferson (Philadelphia: William Duane, 1811), 285–89.

[93] *Democracy in America*, 1.1.5, 89; Introduction, esp. 9, 13.

[94] Paul Merrill Spurlin, *Montesquieu in America, 1760–1801* (New York: Octagon Books, 1969), 23n40, 39, 153–

Whatever the weakness of the criticism of Montesquieu's scheme of the three kinds of government, it remains true that in presenting them thus, he is somewhat of a throwback. Pierre Manent has convincingly argued that Montesquieu is deliberately evoking the terminology and rhetoric of classical political thought in these early books so that when he introduces in book 11 the constitution that has liberty as its object, namely, England, it can be seen that this regime cannot be described or explained in those ancient terms.[95] Moreover, Manent argues that by presenting England in this light, as a nation that is not founded in accordance with a principle of government but rather *found*, he brings about a rift between nature and history as authoritative guides to understanding political things.[96] Because England is a nation that cannot be categorized according to its principle, essence, or definition, but can only be discovered and used as a model, not only Montesquieu's supposedly "exhaustive" categorization of regimes, but the principles of healthiness and corruption he establishes in the first part must be thrown out, but also the very idea of better and worse regimes: there is no "best regime."[97] Why then is England a model? Why is it worthy of praise as a nation the laws of which manage to preserve liberty and oppose despotism through its ingenious constitution? If there is no standard, how can England be said to be the best? History *shows* it to be the best, Manent argues. He writes that Montesquieu "has to compare and conclude regarding superiority while eliminating or

54, 240–41. Jefferson was apparently reading *Spirit* around the time of his composition of the Declaration of Independence, according to dating of entries in his commonplace book, but years later embarked on a sort of anti-Montesquieu crusade, including his translation and publication of the highly critical commentary of *Spirit* by Destutt de Tracy.

[95] See Rahe, *Logic of Liberty*, 68–69.

[96] Manent, *City of Man*, 13–16.

[97] This interpretation stands in stark contrast to that of many other scholars, who see in the English regime a new form of government, but one no less informed by teaching as to what is best by nature. See, e.g., Schaub, "Montesquieu's Legislator," 153–54, where she identifies liberty as a "new standard" in part 2, but parts 1–3 as the half of the book on "nature." See also Pangle, *Theological Basis*, 82. But cf. Rahe, *Logic of Liberty*, 65–69.

invalidating the very notions of comparison and superiority." Only when we see England with its liberty do we see that liberty is the standard: "The English regime brings with it its own criterion, the new criterion of liberty."[98]

Manent defends himself against the charge that he overstates his case that Montesquieu is a historicist, anticipating the evidence that Montesquieu finds the origin of the English Constitution in the "forests" of Germany: isn't that just a quasi-historical way to refer to the state of nature, one might ask? No, he says: in those forests, one does not "seek," as with the best regime; one "finds" whatever allows the most liberty. This is not convincing: could not one say the same thing of Hobbes and Locke? Furthermore, the 'finding' of the English regime is not accidental, but is presented in the context of an argument about the needs of the soul, which are unchanging: weakness and fear characterize the state of nature and the soul under despotism. This is consistent in Montesquieu's presentation. The reason why the English constitution is unique is that it is an advanced and powerful state without organization according to a common conception of virtue; it maintains the individual liberty of the state of nature reflected among the barbarians, German and otherwise, while restraining its excesses. The regime itself of course must be accidental, since it is not founded, and there is no doubt that Montesquieu's experience of England was a revelation for him, but it is illuminating and revelatory not because of its historical qualities, but for the way it harmonizes with, instead of doing violence to, human nature.

[98] Manent, *City of Man*, 16; see also 28.

Book 9: Property, Liberty, and Security

While the unique qualities of the English Constitution are the focus of part 2, however, Montesquieu begins this section of the work with defense and security (9.1), topics not connected to the peculiarities of the English regime in any immediately obvious way. The need for defense against foreign invaders and internal vice occasions his immediate deviation from the neat regime principles he had established in part 1. The inevitable fate of all unalloyed political orders is despotism, unless they can organize themselves internally as republican and externally as monarchic: the "federal republic," Montesquieu writes, provides for defense without despotism. It allows a state to be strong enough to defend itself without being internally corrupted. In writing of this provision, Montesquieu departs from the simplicity of ancient forms, not only in their constitutions, but in their moral orientations, because both good and bad republics and aristocracies suffer from external conquest or internal vice, depending on their size. "The ill is in the thing itself," Montesquieu writes, and "there is no form that can remedy it" (9.1). The modern move at the outset of part 2 immediately declares that both good and bad regimes will be despotic, if large enough, and thus that the cure for despotism will be found separately from the question of whether the regime is good or bad; it will be found in an institutional arrangement, namely, the federal republic.

Montesquieu does not identify such a republic as something particularly modern. However, in the midst of praising confederacies of republics, Montesquieu remarks, "Associations of towns were more necessary formerly than they are today. A city without power risked greater perils. Conquest made it lose not only executive and legislative power, as today, but also all property among men" (9.1). To the word "property" in this sentence,

he appends a footnote: "Civil liberty, goods, women, children, temples, and even sepulchers." This is a list of kinds of property, of things which need to be defended and secured. The list has apparently been diminished in the present, and we will want to explore how and why. Furthermore, why does Montesquieu list these specific things as kinds of property? Finally, why does he begin the part of *Spirit* dedicated to liberty with the book on national defense and the preservation of the state?

The last question seems easy to answer: a state cannot be free unless it is secure. Yet, if it is this simple, why does Montesquieu introduce the distinction between contemporary states and ancient ones, among the latter of which not only national autonomy but also one's property, including one's liberty, family, and religion, was at risk in war? By so doing he makes security do double duty as the integrity of a nation and the integrity of the individual. He alludes to modern man's unique independence, his separateness, which insulates what he values most from war and political disintegration. Modern man's property is not entirely at stake in foreign conflict because modern wars do not involve the taking of slaves and the conquest of gods, but rather the taking of states and territories. But why? To state this difference is only to beg the question. The difference between the property taken in ancient and modern war adumbrates the difference between ancient and modern property simply. As stated in Chapter One, above, what characterizes modern conflicts, both external and internal, is the importance of belief. Thus Montesquieu indicates here, if only briefly and indirectly, that his books on offensive and defensive force have a wider applicability than questions of international relations and the right of nations, and will bear on later books in part 2, on liberty defined not only as the absence of external restraint, but as the opinion of security, including the security of the peculiarly modern kind of property.

The need for security which necessitated federal republics has, of course, always been present. However, in modernity the nature of that security has changed. It is not the mixed government of the federal republic which makes what is modern in Montesquieu's account, even though he held off raising the specter of such monstrous forms in the first part, which laid out the pure regime types in a somewhat Aristotelian fashion and thus may be said to be his more classical-philosophical presentation.[99] The need for security, in itself, can be said to be what leads ancient republics out of their small, virtue-centered forms into their bulkier, less virtuous futures.[100] Nevertheless, what we need security *for* changes in modernity because the character of our property, which we wish to secure, also changes.

Pointing ahead to his discussion of commerce and the invisibility or imperviousness of property with the use of letters of exchange (21.20), but also to changes in religion, the family, and even one's own sense of freedom and identity, Montesquieu identifies in the aforementioned footnote those aspects of property which undergo a transformation in modernity. What follows reflects his attention to that change. While books 9 and 10 are ostensibly about war, conquest, and defense, Montesquieu, in a way similar to Machiavelli, only uses the occasion of war and the preparation for war as a way of talking about how states should provide security internally and psychologically, and of showing how present circumstances threaten that security in new and terrifying ways. At the same time, he moderates and restrains the aspects of Machiavelli's teaching that he finds conducive to

[99] It is only a "somewhat Aristotelian" presentation because Montesquieu divorces the natures of regimes from their principles, or motivating passions. See Rahe, *Logic of Liberty*, 65–66. This is to say nothing of the difference between Montesquieu's conception of virtue as an animating passion in democracies and the Aristotelian definition of virtue as the character of soul in accordance with reason.

[100] See Leo Strauss, *Thoughts on Machiavelli* (Glencoe, IL: Free Press, 1958), 298–99; and Harvey C. Mansfield, *Machiavelli's New Modes and Orders* (Chicago: University of Chicago Press, 1979), 186–89, 238, 241, for indications in classical philosophy that innovations in offense force lead of necessity to innovations in defensive force and even in the nature of the regime.

despotism. We turn to this project in the next section.

Book 10: Commentary on Machiavelli

In book 11, Montesquieu introduces separation of powers in the English constitution as the means of orienting the state toward political liberty. However, as we will see below, he prefigures this account in the earlier books of part 2 with a hidden commentary on Machiavelli. Why? Montesquieu represents England as a novel political form, one not oriented toward or depending on virtue, or motivated by honor, but a mixed regime with political liberty as its purpose. As Machiavelli rejected the classical teaching on virtue and politics, showing how concern for virtue often leads to imprudent and unnecessary cruelty and bad government, and Montesquieu portrays England as a political order that limits, rather than promotes virtue, relying instead on institutional arrangements conducive to liberty and good order, Montesquieu wishes to place England within Machiavelli's modernity, using the language of acquisition and preservation of states as a model for separation of powers. This placement establishes terms in common with and lays the groundwork for his later replacement of conquest with commerce.

Accordingly, in the ninth and tenth books, on the defense and offense of states, Montesquieu both reproduces the Machiavellian turn away from the principles of classical political philosophy, and moderates and modifies his teaching. He concurs with Machiavelli in showing how different types of regimes must be guided by practical concerns in war, presenting even arguments about the justice of actions in terms of prudence, but differs from him in his model of mixed republicanism, which not only combines elements of republicanism and monarchy—which itself is somewhat consistent with Machiavelli's

presentation—but also separates judicial and executive power and political and civil law.[101] The importance of these latter separations is that they moderate and weaken despotism, working against the glory-motivated prince's inclination to punish and tyrannize conquered foes domestically, and to push for increased conquest, to the detriment of his people, externally.[102] Montesquieu thus adapts Machiavelli's concern for preservation of the regime from the point of view of the prince who wishes to establish good order for the sake of his own power, for his own project of promoting the political liberty of the constitution for the sake of the security of the citizen's property.[103]

It is in book 10, "On laws in their relation with offensive force," especially, that Montesquieu signals his moderation, or even transformation, of Machiavelli's teaching. This

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[101] Paul Carrese, "The Machiavellian Spirit of Montesquieu's Liberal Republic," in *Machiavelli's Liberal Republican Legacy*, ed. Paul Rahe, (Cambridge: Cambridge University Press, 2006), 121–42, esp. 133–37. My account differs from Carrese's in finding the reflection of Machiavelli's principles in the structure of *Spirit* itself, rather than in a direct analysis of Montesquieu's and Machiavelli's principles.

[102] On the moderating of monarchical power through the independence of judicial power and the focus on security rather than fear, see Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (Baltimore: Johns Hopkins University Press, 1993), 213–46, esp. 228–30; and Carrese, *Cloaking*, 43–53. For an argument that strongly distinguishes between Montesquieu's and Machiavelli's republicanism, see Sullivan, "Montesquieu's Correction." Sullivan attends especially to the difference between the two thinkers' approaches to accusations and judgments. Despite the difference in the titles of their articles, a similar argument can also be found in Carrese, "The Machiavellian Spirit," 137–40; see Sullivan, "Montesquieu's Correction," 267n11. Paul Rahe, in *Logic of Liberty,* 33–36, on the other hand, contrasts Montesquieu and Machiavelli on their views of Roman conquest. None of these authors focus, however, as I do here, on the reflection of Montesquieu's adaptation and transformation of Machiavelli's thought in the structure of *Spirit* itself, and especially, in the connection between parts 1 and 2.

[103] This project, possibly even including separation of powers, is arguably consistent with Machiavelli's intention. In Chapter 7 of *The Prince*, he commends Cesare Borgia, who "found [the Romagna] commanded by impotent lords who had been quicker to despoil their subjects than to correct them" (Niccolò Machiavelli, *The Prince*, trans. Leo Paul S. de Alvarez [Long Grove, IL: Waveland Press, 1980], 44). In giving the subjects "good government," Borgia established "Remirro de Orco, a cruel and expeditious man," with "full power," but once the province had been restored to "peace and unity," he "set up a "civil judiciary," and had de Orco cut in half, literally but also symbolically *separating* judicial and executive power (45). See also ch. 21, p. 135, where Machiavelli writes that the prince should "encourage his citizens, enabling them quietly to practice their trades… so that this one is not afraid to embellish his possessions for fear that these might be taken from him, nor this other to open a traffic for fear of taxes." The difference in emphasis between Machiavelli and Montesquieu, which could be stated as the difference between the prince and the people, could also be stated as the difference between what is necessary for political beginnings, or what is necessary to establish political order, and what is necessary for ongoing political operation, or what is necessary to maintain an established political order. See Mansfield, *Taming*, 240.

is consistent with Montesquieu's adherence to the modern natural rights teaching, which founds and justifies all military action on an argument from the need for defense of life, rather than the felt need for the head or heads of state to win glory through great enterprises abroad. But in book 9 Montesquieu throws in with Machiavelli by blending or mixing the classical forms of regimes he had seemed to affirm as stable types in part 1, and by establishing his use, which will continue in book 10, of the Machiavellian language of chapters 3 and 4 of *The Prince*.[104]

The third chapter of *The Prince*, "Of mixed principates," informs Machiavelli's own deviation from his own brief classification of regimes in his first two chapters. Machiavelli presents the "difficulties" of principalities that have an added "member" as a question of "instability" (11).[105] His overt emphasis is on conquest, and he goes on in this chapter to outline different ways to maintain control of conquered territories. Montesquieu's book 9, on the other hand, is explicitly about defense. However, both present their chapters in terms of instability and destruction, and recommend ways to prevent these.

The fourth chapter of *The Prince*, "Why the Kingdom of Darius Which Alexander Had Seized Did Not Rebel Against His Successors after the Death of Alexander," contrasts "two

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[104] See Shackleton, *Montesquieu,* 265: A "displaced title-page for Book III" from volume 1 of the Paris manuscript of *Spirit* indicates that Montesquieu intended to begin the treatise with the general theme of the tradition that "a political treatise should contain a discussion of the different forms of government." According to Shackleton, this page indicates that Montesquieu intended to start with a traditional classification of regimes, "reserving for use at a later stage his approving description of the English constitution." Accordingly, at this time ("shortly after 1734"), Montesquieu acquired copies of Aristotle's *Politics*. He wrote in his *Pensées* that he needed to acquire copies of Plato's *Laws* and the *Politics*, and then later crossed them out, having read them and made extracts (subsequently lost) (see *Pensées*, 907, 1502, 1766). Shackleton argues that Montesquieu's own classification of regimes is already colored by his reading of Machiavelli (266–69). He especially notes the reference back to first principles to prevent or correct corruption of regimes (*Discourses*, 3.1 and *Spirit*, 8.12).

[105] "Instability" is the translation of Harvey C. Mansfield in *The Prince*, 2nd ed. (Chicago: Chicago University Press, 1998), 7. All other translations from *The Prince* in this section are from de Alvarez, and parenthetical citations of *The Prince* in this section are to his edition.

different kinds of government," that of "the Turk" and that of "the King of France" (26), the first a sprawling, despotic empire which is hard to conquer but easy to hold, the latter a monarchy consisting of many separate baronies, making it easy for a conqueror to get a foothold, but difficult for him to maintain his rule. Machiavelli's answer to the question of this chapter's title is simply that the Kingdom of Darius was like the government of the Turk, but Montesquieu, answering the same question in book 10, gives a new answer, for a new situation, signaling the distinction of his argument from Machiavelli's.

Broadly, Montesquieu transitions from the more classical style of part 1 to the more modern style of part 2, to his famous and distinct account of the English regime and its liberty in book 11, first by assenting to Machiavelli's departure from the ancients in book 9, and then by moving beyond, or updating Machiavelli, in book 10. There is ample textual evidence to demonstrate that this is part of Montesquieu's intention.[106]

In the first place, as was previously mentioned, Montesquieu signals from the beginning of book 9 a continuity with Machiavelli in describing the mixed republic. This is especially clear when he describes the difficulty of usurpation in "confederated states" (9.1), directly echoing Machiavelli in chapter 4 of *The Prince*. Montesquieu attempts in subsequent chapters to describe the less ambitious military program he favors in Machiavellian terms.

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[106] There is also historical evidence, inasmuch as it can be shown that Montesquieu understood England partially through the lens of Machiavelli. See Shackleton, *Montesquieu,* 127, on Montesquieu's reading of Bolingbroke's *The Craftsman*, where he would have found an account of Machiavelli's relevance for the issues of the eighteenth century; 142–43, on Montesquieu's quotation of the Englishman William Cleland, circa 1730, in his *Spicilège* (529) ("Machiavelli spoke of princes as Samuel spoke of them, without approval. He was a great republican."); and 152, where Shackleton identifies *The Craftsman* and Cleland as sources for Montesquieu on Machiavelli and the Romans: Machiavelli was included in a list in Montesquieu's *Spicilège* of "books I have to read," and Montesquieu acquired an Italian copy in 1729. See Ettore Levi-Malvano, *Montesquieu e Machiavelli*, (Paris: Librairie Ancienne, 1912); and A. Bertière, "Montesquieu, lecteur de Machiavel," in *Actes du Congrès Montesquieu* (Bordeaux: 1956), 141–58; and Shackleton, "Montesquieu and Machiavelli: A Reappraisal," *Comparative Literature Studies* 1, no. 1 (1964): 1–13.

The spirit of monarchy, as opposed to that of a republic, may be "war and expansion" (9.2), but this spirit is opposed to that of "despotic states," which destroy their frontiers in order to provide for their security (9.4). Monarchies build "strongholds" or fortresses, something despotic states are "afraid" to do, because "no one there loves the state or the prince" (9.5). In this, Montesquieu makes an argument similar to Machiavelli's, who wrote in chapter 20 of *The Prince* that fortresses "will not save you if the people hold you in hatred" (130).[107] In the next chapter, Montesquieu contrasts France and Persia, or as Machiavelli would have it, "the kingdom of Darius," on similar grounds as Machiavelli, but here emphasizes the size of the kingdoms rather than their unitary or confederated composition (9.6). Montesquieu's purpose differs from Machiavelli's: he aims to show the folly of the present King's project for universal monarchy in Europe, which has actually improved the position of its neighbors, and weakened France (9.6–9).[108] He argues, again following Machiavelli, that rather than seek to conquer weaker neighboring states, France should support them (9.10; *The Prince* ch. 3, p. 14).

In book 10, Montesquieu restates Machiavelli's list of remedies available to the prince in attempting to hold onto a newly acquired state. He writes that the conquering state can 1) allow the conquered state to live according to its own laws; 2) give it a new government; 3) destroy and scatter the society; or 4) exterminate all the citizens. Machiavelli had suggested these five: 1) eliminate the prince's bloodline; 2) do not alter the laws and taxes; 3) "go to live there in person"; 4) send colonies; and 5) support the lesser powers (*The Prince*, ch. 3). The first two he recommends for those acquired states with the same language and

[107] See also *The Prince*, ch. 10, pp. 62–63.
[108] Rahe, *Logic of Liberty*, 21–26.

"province" as the conquering nation. Montesquieu, without obviously mentioning the first, alludes to the second with his description of warring monarchies (10.9), but also negatively through his example of the offenses given by the French in Italy (10.11). The third through fifth remedies are for uniting distinct provinces with separate cultures, languages, and perhaps, religions. Montesquieu's example of the third and fourth is Alexander, who 'went to live' among the Persians, so to speak, by adopting their mores, sacrificing at their altars, and sending a colony of Jews to inhabit the territory (10.14).

Alexander becomes in Montesquieu's hands a model of prudence and humanity.[109] He explains away his vicious actions (10.14, ¶¶3, 11) and writes, "after the conquest, he abandoned all the prejudices that had served him in making it…."[110] His conquest of Persia becomes a model of toleration and liberalism to be opposed to the Romans, and he was so successful in his project "to unite the two peoples," that when he died and his successors fought among themselves, "none of the Persian provinces rebelled" (¶8). In writing this, he is almost quoting the title of chapter 4 of *The Prince* and thus signaling to the reader aware of the parallel to be attentive to how he might be answering that question differently than Machiavelli.

Montesquieu writes that Alexander "wanted to conquer all in order to preserve all," as opposed to the Romans, who "conquered all in order to destroy all," and further that Alexander "found the first ways for doing this in the greatness of his genius." With the use of the word "genius," Montesquieu links Alexander with his own professed activity of acting

[109] Cf. Bibby, *Montesquieu's Political Economy*, 79–80, where the earlier, conquering Alexander is contrasted with the later Alexander, discussed in 21.20, as "civil engineer" and hero of commerce. My argument instead finds a continuity between these two depictions.
[110] On "prejudice," see the Conclusion, "History and Prejudice," below.

with "genius," in order to understand a state's constitution and change it,[111] instead of out of "prejudice" (Preface, ¶¶6, 9, 10, 13, and 16). In the previous chapter, entitled "Charles XII," Montesquieu contrasted the titular Swedish prince with his Alexander, and thereby contrasted his own teaching with Machiavelli's. Charles, Montesquieu writes, "was not ruled by the actual arrangement of things, but rather by a certain model he had chosen; even this he followed badly.[112] "He was not Alexander…" (10.13). Alexander, for his part, "even in the heat of his passions, was led by a vein of reason…."[113] Charles was guided by a model of princes, but Montesquieu is casting that model aside, associating it with despotism (Charles XII is also called a despot in 5.14, the most extensive chapter on despotism.). That he is alluding to Machiavelli, and contrasting himself with him, is further made clear by the statement, made earlier in the chapter, that "[a]ccidents of fortune are easily rectified; one cannot avert events that continually arise from the nature of things" (¶5; see *The Prince*, ch. 25).[114] Mastering fortune, of course, is Machiavelli's enterprise, but understanding what is required by the nature of things is what Montesquieu professes.[115]

After his chapter on Alexander, Montesquieu makes his modification of Machiavelli, and his focus on the question of holding together disparate or diverse states, explicit: he

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111 See 29.5 (in the book on "legislators"): "In order for the Greeks to establish a right of nations, they had to become accustomed to thinking it an atrocious thing to destroy a Greek town; therefore, they should not destroy even destroyers."

112 See Preface, ¶6.

113 Cf. 28.23, "On the jurisprudence of judicial combat," where Montesquieu writes, "Men who are fundamentally reasonable place even their prejudices under rules." With this last paragraph of 10.13, Montesquieu gives us a foreshadowing of Hegel's teaching of history, where reason uses the passions of world-historical men to move history forward. This is not Montesquieu's view, but his own somewhat free adaptation of Alexander for his own purposes, in contrast with "those who have wanted to make a romance of his story," certainly sets the stage for this type of argument.

114 See also Montesquieu's *Reflections on the Characters of Some Princes*, I, where Charles XII is called "a bad copy" of Alexander (*OC* 1:519–20); and *Pensées*, 140, 734, 744, and 774.

115 Schaub, "Montesquieu's Legislator," 155–56. Pangle's *Theological Basis*, as a whole, is meant to elucidate Montesquieu's derivation of principles from "the nature of things."

writes a chapter entitled, "A new means for preserving the conquest" (10.15). It is a curious example: "the Tartar family now reigning in China has established that each body of troops in the provinces would be composed half of Chinese and half of Tartars, so that the jealousy between the two nations will hold them to their duty." Montesquieu writes that this means is "equally proper" for preserving conquest and for "moderating despotism." Both despotic and conquered states are divided into groups of enemies, and each party has greater cause to fear the other than reason to work with it.[116] The "new means" gives a conquered people a place in each body of troops and in each judicial tribunal, thus keeping them from "despair" and moderating the "arrogance" of individuals from the victorious nation. This points toward Montesquieu's description of the separation of powers in the English constitution, where the distinction especially of executive and judicial power—or "executive power over the things depending on the right of nations, and executive power over the things depending on civil right" (11.6, 156)—is necessary in order to preserve "the opinion each one has of his security": one citizen should not "fear another citizen" (157). When in a conquered territory, judicial tribunals and bodies of troops are populated wholly by the conquerors, there is no separation of powers and no liberty; one could call such a situation a perpetuation of the state of war, but Montesquieu calls it "despotism."[117]

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[116] This secondary application of means for preserving conquests is already a novelty in Machiavellian terms. Machiavelli had distinguished between principalities and republics, but not between monarchies and despotisms. He did, however, distinguish between princes who earn the hatred of their subjects by despoiling them, and those who don't (*The Prince*, ch. 19).

[117] In the next chapter (10.16), Montesquieu again mentions the Tartars in the context of constraint and despotism, but his example stands as a contrast to the preceding chapter: instead of mutual constraint of mixed bodies of troops and mixed tribunals, a special Tartar force which acts to enforce the Chinese emperor's rule over the immense area of their conquest. This example demonstrates that it is not just a diversity of factions that is conducive to liberty, but factions deployed in a mutually-constraining way. It also sets up the final chapter of the book (10.17), in which Montesquieu shows how the conquering monarch—or "despotic monarch," as they are now effectively the same—of necessity deploys powers in conquered territories in just this despotic way.

Montesquieu had indicated his novelty already in another way. When outlining the means of preserving conquests, he said of the fourth, killing all the subjects, that it is "more in conformity with the right of conquest among the Romans" (10.2, ¶4). He writes, "I leave others to judge how much better we have become."[118] He writes, "Here homage must be paid to our modern times, to contemporary reasoning, to the religion of the present day, to our philosophy, and to our mores" (10.3, ¶4). This seems to suggest that modernity is less cruel, and can tolerate less cruelty than the ancients, perhaps even especially because of Christianity. But the next paragraph throws that conclusion into doubt: he writes that modern authors of "public right," attempting to follow ancient examples, have actually justified more horrible things than the ancient conquerors, giving to their cruelty and persecution the veneer of legal respectability: "they establish[ed] maxims that the conquerors themselves, when they had the slightest sense, never adopted" (¶5). In the succeeding paragraphs he further explains that they have made these conclusions because they believed that their right to destroy a pernicious society (Montesquieu's third means of preserving a conquest) gave them a right to destroy the individual men that make it up (¶6), or to reduce them permanently to slavery (¶¶7–10). This recalls the observation from the first chapter of book 9, discussed above, that "all property among men" is not at risk in modern conflicts. Perhaps this is not due to the influence of Christianity as what is particularly modern, but to the mores of "our fathers who conquered the Roman Empire," who "softened the laws that they made in the heat, impetuosity, and arrogance of victory" (¶11). Montesquieu, characteristically, makes the barbarians into Alexanders, moderate and gentle conquerors, while Christian kings like Charles XII are the heirs to Roman—and Machiavellian—cruelty.

[118] He compares without comparing, as Manent indicated (*City of Man*, 16).

The maintenance and preservation of a conquest through internal tension or a mutual constraint between the powers within a state is not entirely absent from Machiavelli's presentation, but the earlier thinker focused more on playing the people and the nobles off of each other than the production of enduring order through the "jealousy" of adversarial interests, which becomes the focus of Montesquieu's first chapter on England, and eventually, the genius, expressed by Madison, of the American Constitution.[119] It is important to note, however, that Montesquieu establishes the need for separation of powers in books on war and Machiavellian conquest because this shows not only the continuity of Montesquieu's thinking with Machiavelli's—in a way previous scholars have not explored[120]—but also because it establishes that separation of powers is a way of achieving peace after a conquest, or preserving a conquest, and thus can be found not only among the barbarians who achieved a peaceful coexistence with the Romans, in Montesquieu's retelling, but in a pluralistic modernity which has different "spirits" of law—Roman, Christian, and barbarian—or different political, religious, and individual identities. It will be argued later that Montesquieu's influential presentation of separation of powers in 11.6 is actually just the tip of the iceberg: the legal relation of judicial and executive power is not just about branches of government, but is at root a spiritual reorientation, a reconfiguration of the relation of the individual to government, and a psychological diagnosis of humanity in the age of revealed

[119] *The Prince*, ch. 9; *Discourses*, 1.4, 1.7; *Spirit*, 11.6; *Federalist Papers*, nos. 10, 48, 51. Anne M. Cohler's *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism* (Lawrence: University Press of Kansas, 1988) contains a chapter on Montesquieu's presentation of the separation of powers (Chapter 5, "Liberty," 98–119), but gives a surprisingly small amount of attention to the Founders adaptation of that teaching. On Madison's Montesquieuan understanding of separation of powers, see 160–61.

[120] Cf., however, Mansfield, *Taming*, 233–34; Sullivan, "Against the Despotism," 265n7; and Carrese, "The Machiavellian Spirit," 125, 129, and 132–33 for passages where other scholars have touched upon the points of the previous section.

religion that requires special attention to the fragility and *inquiétude* of the soul.[121] This spiritual, rather than merely tactical or political argument, is already present in book 10, where Montesquieu ostensibly focuses on the achievements of princes in the Machiavellian mode, but actually attends to the psychological needs of the individual.

Background of Book 11

Montesquieu's description of the "new" means of maintaining a conquest, or of moderating despotism, from the end of book 10, finds its way into book 11 with the account of the English constitution.[122] It must be shown, however, how a means either for maintaining a conquest, or for moderating despotism, applies to the English case.

Montesquieu shows his hand by introducing the question of moderating despotism, which had previously been just one of a number of regimes that could conquer, as roughly equivalent to maintaining a conquest. He is able to talk about them together because each requires the same things and is, in effect, the same thing: despotism is the maintenance of a state of war of the ruler over his subjects; he must maintain them in fear, and is himself constantly afraid of their uprising. The question of preserving conquest is the same as that of establishing a lasting peace, instead of a merely temporary reprieve from war, or the utter

[121] Cf. Rahe, *Logic of Liberty*, 82, 99–108.

[122] This argument, that the first two books of part 2 are thematically related to and naturally lead to the latter books, should be contrasted strongly with the thesis of Pierre Janet in "Comparaison des théories politiques de Montesquieu et de Jean-Jacques Rousseau," in *Revue des cours littéraires* (1871), reprinted in his *Histoire de la science politique* (Paris, 1887), vol. 2, 465–77 (citation from Robert Shackleton, "La genèse de *L'Esprit des Lois*," *Revue d'Histoire littéraire de la France* 52, no. 4 [1952]: 425). In effect, Janet argues that Montesquieu wrote the first eight (or ten) books of *Spirit* before, and the eleventh and following books after his visit to England. This thesis is opposed by Jean Brèthe de La Gressaye (*De l'Esprit des lois*, vol. 1 [Paris: Belles Lettres, 1950]), who argues that the English chapters were written first, before the idea for *Spirit*. Shackleton, in "La genèse," takes up this question and sides, ultimately, with La Gressaye. This has become the accepted view of *Spirit*'s composition history, and is reflected in the works of Rahe, among others.

destruction of the conquered. Throughout book 10, Montesquieu denigrates the Roman mode of conquest, which is akin to despotism, and praises that of Alexander (10.3, 10.14). The identification of destructive conquest with despotism is so strong that the main emphasis of the chapter is on preventing the monarchy that conquers from becoming despotic. Republics are more likely to conquer, and more likely to be cruel in their conquest, the more they are monarchical or have monarchical elements (10.6). Furthermore, monarchies are more despotic the more they engage in conquest: Montesquieu writes, "Such is the necessary state of a conquering monarchy: frightful luxury in the capital, poverty in the provinces at some distance from it, abundance at the farthest points. It is as it is with our planet: fire is in the center, greenery on the surface, and between them an arid, cold, and sterile land" (10.9). This geographic description reminds one of a sentence from part 1 about the tendencies of monarchies: "Rivers run into the sea; monarchies are lost in despotism" (8.17).[123] In that chapter, Montesquieu writes that "a monarchical state should be of a medium size"; in book 10, he writes that as monarchies expand, they must treat conquered provinces "very gently" or else fear dissolution (10.9).

Besides Alexander, Montesquieu's model of gentleness after a conquest is the Germans. Early in book 10, after establishing the principle that people reduced to servitude during conquest should be allowed to leave that condition, he writes, "I am not saying vague things here. Our fathers who conquered the Roman empire acted in this way. They softened the laws that they made in the heat, impetuosity, and arrogance of victory; their laws had

[123] See also 2.4, 18 and 30.11, 629 for other uses of the image of the sea to represent despotism. Cf. Diana Schaub, *Erotic Liberalism: Women and Revolution in Montesquieu's "Persian Letters"* (Lanham, MD: Rowman & Littlefield, 1995), 135–36.

been hard, they made them impartial" (10.3, ¶11).[124] It is strange of Montesquieu to characterize barbarians as gentle and moderate, given what he will say in book 28 about the almost vindictive partiality and cruelty of barbarian law (see 28.3 especially). But here he distinguishes between the passions of the man or the people, and the wisdom and moderation of legislators. At the beginning of book 29, Montesquieu writes, "I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation should be that of the legislator." Here, he writes, "The Burgundians, the Goths, and the Lombards wanted the Romans to continue to be the vanquished people; the laws of Euric, of Gundobad, and or Rotharis made the barbarian and the Roman fellow citizens" (10.3, ¶11). Note that peoples are named in the first part of the sentence, while legislators are named in the second. The same contrast between the passions of individuals and the moderation of the legislator is drawn in the next paragraph, between the actions of Charlemagne to "subdue the Saxons," and the laws of Louis the Pious to free them.[125] This distinction is also found in the difference between the two long chapters on the English (11.6 and 19.27), and is reflected in the difference between moderate states and moderate governments, considered in "Separation of Powers," below.

Despotism

Montesquieu moderates Machiavelli's teaching on conquest partly because he is much more

[124] See also 26.15, 511, where Montesquieu mentions how "the spirit of liberty called…the peoples who destroyed the Romans" to respect the property of the vanquished.

[125] It is worthwhile to note, in conjunction with this consideration, the seeming contradiction of this point found in 29.19, where Montesquieu speaks of "the passions and prejudices of the legislator." See the Conclusion, "History and Prejudice," below.

concerned than Machiavelli with the problem of despotism.[126] He ties the preservation of conquest to the moderation of despotism in order to tie his own project, discreetly, to Machiavelli's, but also to connect the barbarians' manner of ruling the lands they conquered from the Romans with their characteristic legal institutions which he finds to be antithetical to despotism. The Germanic institutions, which are elaborated on partially in part 3, and much more fully in part 6, thus lie in back of the argument at the beginning of part 2 and help to explain the transition from book 10, on offensive force, to book 11, on the promotion of liberty through the law. In both cases the real question is how to prevent or moderate despotism.

The importance of despotism to Montesquieu, and thereby his distinction among early modern political thinkers, is seen early in the work.[127] In an early chapter, "On the laws of nature," Montesquieu explicitly opposes the teaching of Hobbes that fear in the state of nature would cause men to attack each other, and then to contract themselves in obedience to a power they can fear in common with other men (1.2). Such institutionalized fear, he suggests, would defeat the purpose of living in civil society. Montesquieu, instead, argues that fear makes men timid, not bold; it makes a man aware of his weakness, not confident in his strength. Timidity, though, has a surprising manifestation, or tragic counterpoint: cruelty. In a later chapter, Montesquieu writes that one should not oppose religion with strong penal laws, adding great bodily threats to great spiritual ones: "Between these two fears," he writes, "souls become atrocious" (25.12). That atrociousness and cruelty are the reflection of fear,

[126] Sullivan, "Montesquieu's Correction," 266–67.
[127] For a recent thematic treatment of the importance of despotism in *Spirit*, see Vickie B. Sullivan, *Montesquieu and the Despotic Ideas of Europe: An Interpretation of the "Spirit of the Laws,"* (Chicago: University of Chicago Press, 2017).

and both the cause and effect of despotism, a rule rooted in a fear which affects both ruled and ruler (5.14, ¶¶15, 29), is central to Montesquieu's psychology and provides the key to understanding his proposed legal and spiritual remedies. What he means by moderate government is one that does not, like despotism, constantly remind its subjects of their weakness and vulnerability, demonstrating to them that they are always in danger, and from unseen places, of being harmed. Instead, it makes clear to a subject what he may do and say, and leaves him with "political liberty," or "that tranquility of spirit which comes from the opinion each one has of his security" (11.6, 157).[128]

It could be argued that Montesquieu's argument is rather that man's fear leads either to timidity or cruelty depending on whether he feels his weakness or his strength. However, while it is true that the feeling of strength is conducive to cruelty, his stress on atrociousness of souls as a *result* of despotic power, an atrociousness that leads one to commit acts of cruelty, if only to oneself, shows that the default mode of the soul is timidity, and that even the feeling of strength that leads to cruelty rests on a more fundamental timidity, or feeling of weakness. Even where Montesquieu seems to maintain the distinction between the weak-feeling and the strong-feeling, for instance, in writing of "timid and brash consciences" (12.4, 190), his argument is that even the strong-feeling rests on weakness; in that case, the distinction between "an infinite being" and "the weakness, ignorance, and caprice of human nature." The distinction between "the pious man and the atheist" that opens book 25 is that "the one speaks of what he loves and the other of what he fears"; that is to say, the atheist's feeling of strength, his superiority to religion, rests on fear. This is not to say that fear is equivalent to timidity, or the feeling of weakness, only that the feeling of superiority arises

[128] Sullivan, "Montesquieu's Correction," 271, 273–77.

from a condition of weakness. This is how Montesquieu often speaks of religion. Later in book 25, he writes that we are greatly attached to intellectual religions because they make us feel superior, but they have this effect because we feel that we have been chosen to be saved from hell, or that we ourselves "have chosen a religion that withdraws divinity from the humiliation in which others had placed it" (25.2). Conversely, the tolerant religions, often without intellectual components, are such because they do not feel threatened by idolatry (25.10, 25.15).[129]

The question of whether timidity is at root of cruelty, or whether it is fear that leads separately to timidity and cruelty, depending on whether one feels weak or strong, is less important, however, than the stress Montesquieu places on timidity generally, as opposed to fear. For Hobbes, while there exist in the state of nature both the fearful and the glory-seeking, the latter are "vain-glorious," vain because while they feel superior to others, they are not actually so.[130] Fear for Hobbes is the passion to be relied upon, reminding men of their weakness, and thus making them better subjects in a commonwealth. For Montesquieu, however, fear is just as likely to lead to passions destructive of national and international peace as vainglory, and is in fact the root of vainglory. Montesquieu aims as Hobbes does to remind men of their fundamental equality, but he does so by attending to and meliorating their feeling of weakness rather than by exacerbating it.

Montesquieu establishes early in part 1 that fear is the principle of despotic government (3.9) and that the opposite of a despotic government is a moderate one (3.10). The former is without limits; it follows "the prince's will" mechanically, automatically,

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[129] In this account of the zealousness of converts to an intellectual religion, Montesquieu gives a proto-Nietzschean genealogy of morality.
[130] Hobbes, *Leviathan*, 11.11–12.

without reason, "as infallibly as does one ball thrown against another." Another way of putting this is that despotic government wishes to function "as the physical world," and does not account for the way that "particular intelligent beings are limited by their nature and are… subject to error" (1.1, ¶10); instead, in despotism, "[m]an is a creature that obeys a creature that wants" (3.10); despotism is the rule of imperfect human beings, characterized by their fear—the prince fears relaxing his rule, as he relies on fear to maintain his power (3.9, ¶3)—over other imperfect beings, also living in fear. This is put in a different way by Montesquieu when he writes, "While the principle of despotic government is fear, its end is tranquility; but this is not a peace, it is the silence of the towns that the enemy is ready to occupy" (5.14, 60). This analogy makes clear the enervation and lack of industriousness one find in despotic nations. Free and moderate states are characterized by greater energy, enterprise, and individual initiative, whereas in despotic states, "nothing is repaired, nothing removed"; "one draws all from the land, and returns nothing to it; all is fallow, all is deserted" (5.14, 61).[131]

In a despotic state, no one is willing to spend money and use property in an attempt to improve his situation, and thereby possibly also the common lot. All improvement comes

[131] This is an important chapter to read together with Tocqueville's *The Old Regime and the Revolution* and *Democracy in America*. Tocqueville describes the stagnation and lack of enterprise of the late old regime in very similar terms. He attributes this to the centralization of administration, something which would appear to be consistent with or even necessary for despotism. Tocqueville, however, criticizes Montesquieu for making despotism a kind of government and making its principle fear. His argument rather suggests that religion is the true spring of despotism, what makes it long-lasting. However, Montesquieu makes the same point as Tocqueville here when he writes, "In these states, religion has more influence than in any other; it is fear added to fear" (5.14, ¶15). Tocqueville writes in *Democracy in America*, 1.1.5, p. 89, "Montesquieu, in giving despotism a force of its own, has, I think, done it an honor that it does not merit [here he cites *Spirit*, 3.9–10]. Despotism all alone by itself can maintain nothing lasting. When one looks at it from close up, one perceives that what has long made absolute governments prosper is religion and not fear." This paragraph follows one in which Tocqueville mentions the mutual supports of Turkish despotism and "the religion of Mohammed." Montesquieu, in 5.14, makes the very same point: that despotism by itself succeeds in nothing, but that with religion, it can. His example is the same: "It is religion that slightly corrects the Turkish constitution" (¶16). Tocqueville thus disagrees with and corrects Montesquieu in a way that signals their fundamental agreement.

from the prince and his agents. Individuals either have no property, or their property is insecure and thus of little to no use. The most oppressive despot will "declare himself owner of all the land and heir to all his subjects" (5.14, ¶17). "This always results," Montesquieu writes, "in abandoning the cultivation of the land and, if the prince is a merchant, in ruining every kind of industry."

Despotism is a simple form of rule, consisting of masters and slaves. Theoretically, the masters have absolute power. However, the very limitlessness of that power, which would seem to make a prince strong, usually makes him weak, or liable to act in such ways that will lead to the lessening of his power. To take a simple case from the chapter we have been examining, when there is no fundamental law determining succession, the state thereby has one additional great cause for dissolution (5.14, ¶22). In such a case, it is the prince's own fear which leads to instability and terror (5.14, ¶24), and somewhat paradoxically, the weaker the prince, the greater the damage he will do to his own state (5.14, ¶29). Despotism is poorly suited to man's weakness; instead of assuaging his fears, and reassuring him in his vulnerability, it reminds him of these. The wicked despot who terrorizes his people does not thereby earn loyal subjects, but those with souls that are both timid and "atrocious," frightful souls that await their opportunity to revolt and terrorize their former masters. Despots must become increasingly cruel: "Souls that are everywhere startled and made more atrocious," Montesquieu writes in one of his chapters on the Japanese despotism, "can be guided only by a greater atrocity" (6.13, ¶9; cf. 25.14). This is a paradoxical connection, in that both the masters who commit acts of atrocity and their timid subjects who are punished by them are called atrocious. However, what unites them is the environment of fear in which both

operate.[132]

Montesquieu's first use of the important word *atroce* is: "When we read in histories the examples of the atrocious justice of the sultans, we feel with a kind of sorrow the ills of human nature" (6.9). The Turks, and the rule of its sultan, are for Montesquieu the prime example of despotic rule, as for Machiavelli they represented the non-confederated state. But they are nevertheless typical, and the ravages of their rule seem to belong to man's lot by nature. Despotism is the default case; moderation and liberty are unusual, requiring either, seemingly, the wisdom of a legislator (29.1), or great luck (11.5) to come about. At the end of the long chapter on despotism, Montesquieu writes, "After all we have just said, it seems that human nature would rise up incessantly against despotic government. But, despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government" (5.14, ¶30). Why is moderate government, rather than despotism, so rare? Because the powers of government must be separated and balanced through "a masterpiece of legislation"; "In order to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak,

[132] In part 3, in a chapter on "a contradiction in the characters of certain peoples of the South" (14.3), Montesquieu further explicates this paradoxical connection between weakness and atrociousness. He asks how the Indians' natural lack of courage goes together "with their atrocious actions [and] their barbaric customs and penitences," writing that "this is considerable strength for so much weakness." In this part he is concerned with attributing to this condition a climatic cause. He writes that while they are timid, nature has also given them "such a lively imagination that everything strikes them to excess"; because they dread so many things more than death, they sometimes act without fear of death. The solution to this is "a wise legislator," presumably one who would introduce moderation, using the powerful imagination of these peoples to attach them to reasonable practices. The barbarians, by contrast, have little need of "arts," "education," or "laws," thanks to their climate. The determinism of this chapter is undermined a little by the reference to Europeans born in the Indies acting like Indians, suggesting the importance of education, and the remark that the barbarians "maintained themselves with remarkable wisdom" against the Romans. This chapter on the Indians seems to be contradicted by a later chapter in this book (14.15), where the Indians are contrasted with the ever-atrocious Japanese (6.13, 14.15, 25.14). Here Montesquieu is either maintaining a distinction between the Indians and other peoples of the Indies (see 245n33), or emphasizing judicial laws rather than religious ones: the Indians have atrocious religious laws but gentle judicial ones. At any rate, his point in 14.3 is that being timid, or "without courage," is not inconsistent with great acts of "strength."

to put it in a position to resist another…." Montesquieu writes that this is a form of government "that chance rarely produces and prudence is rarely allowed to produce" (echoing Socrates on philosopher-kingship).[133] Book 5, where this indication of separation of powers is found, is the book on "the laws given by the legislator," and is in part 1, where Montesquieu describes how the laws follow from the natures and principles of each form of government (books 2–4, 6–7, titles). By mentioning this institutional arrangement here, at the end of the chapter on despotism in the middle of the book on the legislator, he indicates that the English constitution's separation of powers is the legislative antidote to despotism. By making the English mixed regime this antidote, however, he does not suggest that the regime types of part 1, each moved by its separate spring, are separately unique kinds of despotism—after all, despotism is only one of the three forms of government, and the argument of the first chapter of *Spirit* is that the intelligent world "does not follow its laws consistently" (1.1, 4), i.e., in the Montesquieuan sense, despotically—but he does perhaps suggest, by only indicating and not explicating the English mixed regime in part 1, where we find the distinct regimes, that for the modern world only the mixed regime could not despotic.[134] We turn, in the following section, to that regime.

Separation of Powers

At the beginning of book 11, Montesquieu makes clear what earlier had been alluded to

[133] *Republic*, 1.347d, 5.473c–d, 6.489a–b.

[134] It is important to note in passing here that Montesquieu mentions both "chance" and "prudence" as producing, however rarely, the mixed, moderate regime. Thus, despite calling it a "masterpiece of legislation," he does not come down decisively on the question of whether history or nature is the origin of his principles. It is of course curious that "chance" could produce something that could be called "a masterpiece of legislation."

more than once: that the opposite of despotism is moderation, and that the other kinds of regimes, "[d]emocracy and aristocracy," are "not free by nature," and thus not inherently non-despotic (11.4). Here, he does not mention monarchy, which is more moderate than despotism in ruling "by fixed and established laws" (2.1). In part 2, we leave behind the classifications of book 2 of the natures, and in book 3, of the principles of the different governments, and are left with only despotic government and moderate government, which can have more or less political liberty.

Montesquieu writes, "Political liberty is found only in moderate governments. But it is not always in moderate states." By this he means, as his next sentences indicate, that the virtue of the people does not necessarily make a regime moderate and conducive to liberty. A moderate state is one where the people themselves are moderate, but it seems that no amount of virtue can save a defective constitution.[135] Aristocracy is, then, a defective regime, as democracy is; the rule of the virtuous, whether that virtue is only political virtue (Author's foreword, xli), or moral virtue, is no guarantee of liberty.

However, Montesquieu had said that aristocracies may "repress" themselves, that is, limit the power of their own rule: "either by a great virtue that makes the nobles in some way equal to their people… or by a lesser virtue, a certain moderation that renders the nobles at least equal among themselves…," and thus he says that *moderation* is the soul of these governments" (3.4, italics original). This is a "moderation founded on virtue," but it is a curious abnegating virtue which limits the rule of those most qualified to rule, reducing them to equality. While "by the nature of the constitution" of a republic the nobles must have

[135] Here by 'virtue' is meant, as Montesquieu specifies in his foreword, only political virtue. However, this needs further to be distinguished from good mores, which *are* at the root of moderate governments.

virtue and rule the people, they must also act against, or limit, themselves.

This passage bears a superficial agreement with what comes later: "[Liberty] is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits. Who would think it! Even virtue has need of limits" (11.4). In the description of aristocracy, Montesquieu has the nobles limiting themselves out of their virtue, creating moderate government by reducing themselves to a kind of equality, either with the people or at least among themselves. Here, he suggests that they would be bound to abuse their power, and that virtue itself would be insufficient to limit itself.

Montesquieu follows this remark with the famous statement, "So that one cannot abuse power, power must check power by the arrangement of things." This recalls the end of 5.14 on how to form moderate government, which "prudence," possibly the prudence of nobles in an aristocracy, "is rarely allowed to produce," and more immediately, his observation that the "half Chinese, half Tartar" troops and tribunals allow "the two nations" to "constrain one another" and thus provide a model for "moderating despotism" (10.15). Separation of powers is a means of producing moderation without virtue, thus preventing the despotism that comes with unlimited, undivided power. In the famous chapter on England, Montesquieu again cites the Turks, his emblem of despotism, this time explicitly in opposition to the separation of powers: "Among the Turks, where the three powers are united in the person of the sultan, an atrocious despotism reigns" (11.6, ¶7).

In that same paragraph, Montesquieu says that "most kingdoms in Europe" are "moderate" because while "the prince" has the legislative and the executive powers, the judicial power is left to the people. The English seem to be singled out for special praise

because they separate all three powers. However, Montesquieu later writes, near the end of this chapter, "I do not claim hereby to disparage other governments, or to say that this extreme political liberty should humble those who have only a moderate one" (11.6, 166). The English constitution carries to an extreme the principle which separates despotism from moderate government. Does England go too far? Or does Montesquieu only make this remark so as not to appear to prefer England to France? An analysis of books 30–31 of part 6 will reveal that France does not even, or increasingly does not, succeed in separating executive and judicial power.[136] Nevertheless, it seems that a regime may be moderate, or not despotic, in this sense, without preserving liberty: Montesquieu writes, "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty…" (11.6, ¶4).

Regardless of the status of non-English European monarchies, Montesquieu makes clear that the two powers most in need of separation are "executive power over the things depending on the right of nations, and executive power over the things depending on civil right" (11.6, ¶1), which are rephrased as "the executive power of the state," and "the power of judging," respectively (¶2). It is these that the English constitution is most successful in separating, and for which their model is the Germans. When Montesquieu writes that "one will see [when reading Tacitus' *Germania*] that the English have taken their idea of political government from the Germans" (11.6, 166), he means that what the English constitution borrows most from the barbarian laws is the separation of the power of judging from executive power. However, this here serves only as a bare indication of how much the German institutions inform the English understanding of what liberty is and how to protect

[136] See 18.22, 301 with 31.29, 714.

it. The full picture will not come into view until book 12, on how laws promote political liberty, and part 3, where Montesquieu describes the German mores at great length. Only with these parts of *Spirit* in view will we see how much separation of powers, to be effective, must exist in a context of laws and mores which are themselves conducive to liberty, and that constitutional arrangements are derivative rather than productive of liberty, and are themselves insufficient.

Found in the Forests

When Montesquieu presents the English constitution as the particular and peculiar example of the state that has, as its peculiar purpose, political liberty (11.5), he does not say why "only one nation in the world" has as its purpose something which would seem to be of fundamental importance, given the ubiquity of weakness and timidity in the state of nature and the desire that we should have liberty—that is, that we should be free from the feeling of weakness and fear in society. However, in that famous chapter on the English constitution, Montesquieu makes a sort of connection between the English and a state of nature,[137] writing, "If one wants to read the admirable work by Tacitus, O*n the Mores of the Germans*, one will see that the English have taken their idea of political government from the Germans. This fine system was found in the forests" (11.6, 165–66). This statement, mocked at length by Voltaire,[138] is a rare instance of Montesquieu's connection of his lengthy treatment of barbarian law with his favorable analysis of the English constitution and the

[137] Mansfield, *Taming*, 232.

[138] Montesquieu, *De L'Esprit des Lois* (Paris: Garnier, 1871), 452n1. Voltaire said that Regensburg, the head of the Holy Roman Empire, rather than London, was heir to the "witchcraft" and "rapine" found in the German forests.

implicit critique of the French monarchy. It also serves to connect origins with mores,[139] and customs with a sense of the traditional and sacred; in connecting English government with German mores, he identifies "the forests" of German barbarism as the moral source of the separation of powers, a sort of historical state of nature wherein the passions which justify and determine political government can be found.[140] The remainder of this chapter will treat separation of powers in itself, while subsequent chapters will treat its moral foundations, or the spirit and mores which inform that political institution. In this way, we follow not only Montesquieu's order of presentation, but also the order of the law: the constitution is foundational, and the laws seem to follow from it. However, as we saw in Chapter 1, the principles follow history, or are informed by the spirit of the laws; consequently, by treating the separation of powers before their moral foundations, in a way we treat the effects before the causes, or laws before the mores which they follow.[141]

Book 11: The Importance of Judgment

The greatest emphasis in the famous chapter on the English constitution is of course on separation of powers, but especially on the separation of the judicial power from the

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[139] Many Latin works, among them *Germania*, have only informal titles. Thus this work is known as *De moribus Germanorum* to Montesquieu; to others, it is *De Origine et situ Germanorum.*

[140] Cf. the foregoing section with Manent, *The City of Man*, 13–15. Manent explains Montesquieu's explicit rejection of "seeking" as a rejection of the best regime, or a natural basis for politics, whereas the "finding" without seeking of the English regime—and its barbaric German basis—is the model for "the modern idea of history."

[141] There exists another, albeit brief and tenuous connection between the Germanic barbarians and the English regime. In 1.2, as evidence for the primacy of timidity in the state of nature, Montesquieu writes that "savages have been found in the forests; everything makes them tremble, everything makes them flee"; and in a footnote to this sentence: "Witness the savage who was found in the forests of Hanover and who lived in England in the reign of George I." Savages are not barbarians (18.11), but Montesquieu could nevertheless be indicating in miniature here his thesis on the translation of Germanic mores for the modern, commercial context. On how the same character could produce such different effects, see 14.13–14. See also 30.18, 646 and 28.1.

executive. Montesquieu is careful to say that "most kingdoms in Europe" have "moderate" governments because they leave the third power, the judicial power, or "the power of judging," to the people (11.6, 157). By the third power, "the prince or magistrate… punishes crimes or judges disputes between individuals" (11.6, ¶2). Because by the exercise of this power, individuals face the prospect of the loss of their lives, liberties, and reputations, it is terrifying to the ordinary person, and must be rendered less terrifying. The simplest way to do this is to remove the power to judge the guilt of individuals from the ones who already have the most power, those with executive, war-making authority.

There is another, more clearly logical reason for separating these two powers. It is by the executive power that the "prince or magistrate… establishes security," and the citizen or subject looks to the executive for that security. But Montesquieu immediately follows this by saying that "political liberty" comes from "the opinion each one has of his security," and for a citizen to have that, "the government must be such that one citizen cannot fear another citizen" (¶3). Examples immediately follow explaining why there is such fear with the combinations of any two of the powers and especially with the combination of all three, but as political liberty depends on not having the feeling of being in the power of someone who wants to destroy one's security, it is the independence of the power of judgment of one's guilt that Montesquieu devotes the most attention to. He emphasizes that in a judgment, one should not feel as if one has fallen in among men who are inclined to do him harm (11.6, 158–59). The legislative and executive powers are interested parties, and those of a different class or condition may have a reason to do harm to the accused. The judiciary must be impartial, uninterested, and almost anonymous: "The power of judging should be exercised by persons drawn from the body of the people…. In this fashion the power of judging, so

terrible among men… becomes, so to speak, invisible and null" (158).

Montesquieu thus distinguishes the judicial power from the others, which may be given "to magistrates or to permanent bodies because they are exercised upon no individual." The opinion of security is most insecure in the case of judgment of guilt of individuals. This especially becomes the focus of book 12, in terms of the liberty of the citizen. Here, Montesquieu writes about the arrangement of the powers in the constitution. However, the distinction between the liberty of the constitution and the liberty of the citizen collapses in how the constitution provides for the security of individuals. The constitution protects the opinion of security especially through separation of powers, but the most important separation is of the judicial power, which ensures the opinion of security in which the liberty of the citizen consists (12.1). The constitution enables this opinion of security through the institution of jury trial, perhaps, but it cannot guarantee it, because that liberty, or opinion of security, consists in a feeling not entirely determined by the criminal laws, but having to do with "mores, manners, and received examples" (12.1). Mores, manners, and examples will determine what kinds of laws are made for which we can be held and judged, and if they are too severe and exacting, we might not have the opinion of security despite the strictest separation of executive and judicial power. This is why, in book 12, Montesquieu carefully distinguishes between kinds of crimes and the types of penalties that are appropriate to each (12.4).

Book 11 is about the constitutional, institutional means which establish the possibility of the opinion of security. The book's placement is appropriate as a sequel to book 10 because there Montesquieu described how to maintain a conquest through the establishment of a peaceful coexistence between formerly rival factions, or between a conquering and a

conquered people. The separation of powers is the institutional manifestation of the emphasis of establishing peace and good government after a conquest, such that every citizen is in a way a proud, but conquered enemy. It may seem, on the contrary, that separation of powers maintains conflict and war, while a unification of powers would be the establishment of peace and agreement, but Montesquieu argues that the attempt to establish that unity requires a kind of violence that relies on, and intensifies fear, whereas the separation of powers is based on an acknowledgment and easing of fear.

Near the end of chapter 6, and in chapter 7, Montesquieu insists that he does not "disparage other governments" (11.6), or European monarchies that "do not have liberty for their direct purpose" (11.7), even calling the English constitution a system of "extreme political liberty," suggesting that it is immoderate, and perhaps that the European monarchies are the more moderate, and thus, more preferable forms of government. However, Montesquieu has already distinguished between political liberty, extreme or not, and "natural liberty" and "the independence of each individual," the purpose of "the police of the savages" and "the laws of Poland," respectively (11.5; cf. 11.3). Comparatively, political liberty seems to be a mean between despotism and moderate monarchies on the one hand, and independence and natural liberty, on the other.

However, the question is complicated by what Montesquieu means by "the monarchies that we know" (11.7, title). The ancients, Montesquieu writes, did not have monarchies that included representative bodies of nobles or the people; they had small republics and large empires, but no monarchy featuring representation. Modernity introduced a new model of government, the large monarchy including representative assemblies (11.8). But this moderate form of government is not an alternative to the liberty promoted by the English

constitution; it is a government on the same spectrum as the English one, with the same cause: the Germanic barbarians. In European monarchies, the distribution of the powers "approximates political liberty" according to the degree that their powers are separated, and if they "did not approximate it, [they] would degenerate into despotism" (11.7). Montesquieu's remarks about modern monarchies are bookended by references to Tacitus' *Germania* and the claim that this form of government, whether the English extreme, or the moderate, representative monarchies of Europe, comes from the Germanic nations. In the latter case, Montesquieu writes that moderate European government is the result of the Germanic conquest: "Here is how the plan for the monarchies that we know was formed…. The conquerors spread out across the country…. When they dispersed during the conquest, they could no longer assemble. Nevertheless, the nation had to deliberate on its business [and] it did so by representatives. Here is the origin of Gothic government among us" (11.8). Montesquieu goes on to describe how well this government balanced the interests and liberties of "the people," "the nobility," "the clergy," and "the power of the kings," and concludes that "there has never been, I believe, a government on earth as well tempered as that of each part of Europe during the time that this government continued to exist; and it is remarkable that the corruption of the government of a conquering people should have formed the best kind of government men have been able to devise."

There are several points to take from this high praise and its context. First, insofar as the other European monarchies are moderate and promote liberty, it is for what they, like the English, have taken from the Germanic barbarians. Second, this form of government was accidental, not intentional: it was not founded, but originated out of necessity and historical circumstance. Third, the best government men have devised is a kind of

compromise which is not best at its establishment, but has "the capacity to become better" over time. Finally, and most importantly for the purposes of this chapter, the best government is the result of the need to establish peaceful rule after a conquest.

The theme of book 11 as a whole is the contrast between ancient and modern government, and the modern invention of separation, or distribution of powers, and especially the separation of the power of judging from the other powers. To this end, Montesquieu contrasts the English government and modern monarchies with ancient monarchy, and especially Roman government. This contrast builds to Montesquieu's critique of the way the Romans governed their conquered provinces, which is meant to be read in conjunction with the first part of the book, in which we saw that the moderate barbarian government of the conquered northern Roman empire was the origin of good government, complete with separation of powers and institutions in support of individual liberty. The book can thus be broken into three parts: first, Montesquieu establishes what political liberty in connection with the constitution means, and contrasts it with other definitions of liberty (chapters 1–4). Then, Montesquieu introduces the government of England, with the separation of powers, as the government which has political liberty as its purpose, and connects this government to European monarchies (chapters 5–8). The rest of the book, not including the brief recapitulation of the argument of the book in chapter 20, is a criticism of the ancient understanding of government generally, with a history of the powers of Roman government that is meant to be contrasted with the modern examples (chapters 9–19).

As a background to his description of Roman separation of powers, or the lack thereof, Montesquieu criticizes ancient political theory and contrasts ancient with modern political theory. Here, the sense of Montesquieu as a historicist is strongest, as he writes that

"the ancients… could not achieve a correct idea of monarchy" (11.9) and that "it had not yet been discovered" by the ancients "that the prince's true function was to establish judges and not to judge" (11.11). What is lacking from the ancient world is "the distribution of the three powers in the government of one alone" (11.9, 11.11), or a constitutional monarchy. The closest they came was heroic kingship, but this constitution gave legislative power to the people and executive and judicial right to the kings: "the opposite of that of our monarchies today"; "in the monarchies we know, the prince has the executive and the legislative power… but he does not judge" (11.11). Again and again Montesquieu emphasizes that the key point in the separation of powers is the separation of the executive and judicial: "the masterwork of legislation is to know where properly to place the power of judging. But it could not be placed worse than in the hands of the one who already had executive power" (11.11). The arrangement of heroic kingship is especially bad, Montesquieu says, because while the combination of executive and judicial power makes the king terrible, that he cannot defend himself from legislation makes him fearful. The worst constitutional arrangement is one that makes one fearful at the same time as it gives him great power.

While Montesquieu mostly praises the Roman kingship and republic, in both he finds faults similar to that found in heroic kingship and ancient government generally: the conflation of executive and judicial power. The early kings "had the power of judging civil and criminal suits" (11.12, 170), and even under Servius Tullius, who "increased the power of the people," the king retained power over criminal judgments (11.12, 171; see 11.18, 180). Under the republic, the consuls retained this despotic power, but the people attempted to correct the situation by breaking up the consulate into various offices: the praetors and quaestors, who had power over private and public suits, respectively, are most important

(11.14, 173). In these chapters, Montesquieu describes many different ways the Romans divided offices by class and station, often wisely, but ultimately shows their fundamental lack of understanding of the need to isolate the power of judgment. Emblematic of this is the creation of the Decemvirate, which "had all the legislative power, all the executive power, all the power of judgment" (11.15). Montesquieu dedicates each of the next three chapters to one of these three powers, but writes by far the most about the judicial power. Yet each chapter contains a critique and a warning. Of "the legislative power in the Roman republic," Montesquieu writes that it was "a frenzy of liberty" that led the plebeians to give themselves the power to make laws without the participation of the patricians (11.16). However, this power was admirably checked by the power of the censors and the institution of dictatorship (11.16, 177).

This was not so in the case of the executive power. In this chapter (11.17), Montesquieu makes a critique that could apply to the European monarchs of his day, but also to all forms of triumphalism, political and moral. He writes, "Rome, whose passion was to command, whose ambition was to subject everything, who had always usurped, who usurped still, continually pursued great matters of public business…" (11.17, 177). The people were willing to allow its executives extreme power because they were proud of their success, which they counted as their own success: they limited the legislative "because they were jealous of their liberty," but they did not limit the executive, "because they were jealous of their glory" (11.17, 178). The desire for glory, to revel in triumph over one's enemies and impose one's will on them, Montesquieu previously identified as the sin of despotism, which he contrasted in book 10 with the preservative conquest of Alexander, and with the barbarian Germans. In not limiting the executive power, especially as it is concerned with

foreign wars, the Romans were arrogant. Arrogance is usually how Montesquieu describes the powerful side of a despotism: the Romans acted arrogantly and despotically toward non-Romans. However, the Roman brashness externally is belied by their timidity internally: "[W]hat was this tyrannical system, produced by a people who… needed the citizens' cowardice inside so that they would let themselves be governed, and the citizens' courage outside as a defense?" (11.15). Rome is almost characterized by the cliché of the playground bully, who gives himself free rein to terrorize his schoolmates because his own father terrorizes him at home.

Montesquieu does in fact characterize the Roman government of its provinces as despotic (11.19), but first he writes an extensive chapter on the history of the Roman judicial power (11.18) which shows that Rome's internal government was sometimes almost equally despotic.[142] The chapter begins by asserting that the judicial power was spread widely, but what follows shows that in many respects the Roman system omitted the key separation: the executive would judge in the most important cases. In a footnote, Montesquieu writes, "The tribunes often judged alone; nothing made them more odious" (n49). The Romans did, however, have an institution similar to the English jury trial: for certain trials, judges were selected "with the consent of both parties." Montesquieu remarks that the English practice of jury selection is very similar, and writes that this practice was "very favorable to liberty." However, in what immediately follows, Montesquieu shows its limits: "these judges decided only questions of fact," and "the kings," and subsequently consuls and tribunes, or the holders of executive power, "kept for themselves the judgment of criminal suits," a power

[142] I speculate that Montesquieu makes this chapter eighteen because that number is three times six, and while England, discussed in chapter six, separated its powers, Rome combined them.

that was "exorbitant." The Roman-English likeness is superficial, specious. The remainder of the chapter is a historical demonstration of the original sin of the Roman constitution, as it was realized in successive moments which were, at root, attempts to correct that fault: the Valerian Law "permitted an appeal to the people" in all capital cases; the Law of the Twelve Tables took capital cases out of the hands of the plebeians and gave it to the nobles;[143] and the Gracchi took the power of judging and gave it to the *equites*, or the knights. This last change was especially disastrous for liberty because "the knights were the tax-collectors of the republic… [and were] rapacious"; they were invested with great military power and authority. Montesquieu writes, "Far from giving such people the power of judging, they should continually have been watched by judges." This is especially the case because of the power of the *equites* over property: it is because they had authority to seize the property of the guilty that they should not have had the power to pronounce guilt. This situation led to the insecurity of property and consequently, poverty, wherever the power of the *equites* was unlimited. This was especially the case in the provinces.

In the Roman empire, Montesquieu writes, "[l]iberty was at the center, and tyranny at the extremities" (11.19). The provinces were ruled by "despotic magistrates" who "exercised the three powers." The problem is that republics cannot extend their form of government over conquered states, since it cannot separate "civil and military business," as a monarchy can.[144] As there were no limits to the government of provinces, and the newly acquired peoples were not citizens who could demand judgment by the people, or a limit on taxation according to class of citizenship, "the provinces were ravaged by the knights"; they remained

[143] The *comitia centuriata*.
[144] Montesquieu cites 5.19 (185n77).

the enemies of Rome, and "the force of the provinces added nothing to the force of the republic…." This conquest should be compared with the later barbarian conquest of the Northern Roman Empire.[145] Why did the Germans not destroy and enslave but rather preserve? It is not as simple as saying the Romans preserved liberty for themselves at home, while subjecting enemies abroad. Montesquieu implies that there is something illiberal about the spirit of the Roman law domestically as well. He writes, "[I]n the Roman world, as in Lacedaemonia, those who were free were exceedingly free, and those who were slaves were exceedingly enslaved." But to be "exceedingly free" is not the same as to have political liberty. The Roman people have a "passion… to command [and an] ambition… to subject everything" (11.17); the purpose of the Roman state is "expansion" (11.5). The Romans limit the powers of their various factions and produce a sort of proud citizen liberty that depends upon someone else being their subjects. The English liberty, on the other hand, depends on being subject to no one, not on putting others in their power, but on not being in others' power.

Conclusion

The freedom of the Romans and the freedom of the barbarians are two different things because they are two different peoples with two distinct spirits. The Roman is able to square domestic triumph with foreign subjugation in a way the barbarian cannot.[146] This is because the Roman identifies himself with his city or country in a way alien to the spirit of the barbarians. The Roman citizen glories in Roman success, but the barbarian glories only in his

[145] This conquest is described by Montesquieu at 10.3, 26.15, and throughout book 28.
[146] But the barbarian is able to justify partial, unequal laws over different peoples, domestically, in a way the Christian cannot tolerate (28.1, 534; 28.3; 28.6; cf. 10.3).

own success, and if his nation is triumphant, it redounds to the glory of individuals, not to any barbarian state. The Roman people are "jealous of their legislative power" (11.17), and each citizen is proud of his own rights as a Roman citizen (11.19, 185), but is less sure of himself in terms of executive power. Among the barbarians, the king leads the people in war and little else; he is first among equals. Among the Romans, the executive is everything. Montesquieu suggests that the Romans distinguished civil and military affairs to such an extent that they were in one respect courageous, in another respect cowards: they were manly in defense of the country, and weak in defense of their individual liberties. What was able to bring Rome back from the despotic rule of the Decemvirate was a spectacle—"of the death of Virginia, sacrificed by her father to modesty and to liberty"—which caused each man, individually, to become "offended," not as a Roman, but as "a father" (11.15). This individual, passionate response is more akin to the Germanic spirit in its jealous and angry defense of one's own family, and the Christian spirit in its recurrence to the right of nature. But it is atypical of the Romans.

We will find in examining part 3, which treats extensively the mores and customs of the barbarians, that for the Germanic barbarians, citizenship was tied to one's ability to wield a spear, and thus to one's strength and courage, or manliness. A king who led the tribe in war was chosen to do so because he was respected for his military prowess, but would lose all authority should he no longer maintain this prowess, or if he should attempt to deprive the people of their liberty (18.14). The question of property is tied to this relation between strength and the liberty of a citizen. As we saw in Chapter 1, property is also connected to citizenship and the constitution: what is called the political law, or the constitution, is of fundamental importance because it says what property is and what it is for. For the Romans,

at least in Montesquieu's telling, property exists to tie the people to the city, and thus, the early Roman laws did not allow family names to be destroyed through female inheritance or any other means. This came into conflict with the Christian spirit, for which property is a reflection not of a political order but of a natural order to which human beings belong in a more fundamental, and, in the sense of the *City of God*, higher sense.

In turning from book 11 to book 12, and from the liberty afforded by the constitution to the liberty afforded by mores and laws, Montesquieu takes up these questions. In so doing, he shows that there is something more fundamental than the arrangement of the powers in a political constitution, and suggests, indirectly, that the spirit of a people is more determinative of political liberty than anything else. While in book 11 he treated of the powers of government among modern monarchies and contrasted them with the Roman regime, he did not attend to the way that laws and customs which affect liberty arise out of distinct spirits, particularly the Roman, Christian, and German. There were only slight indications that what has informed the clearer separation of powers in European monarchies was the effect of barbarian law and Christianity. In book 12, by contrast, Montesquieu approaches, still without being very explicit, the question of how different religions inform different approaches to law. This is not a topic that can be broached by attending to the separation of powers, for the question of who executes the laws and who judges one's guilt leaves out the questions of *what actions* are crimes, and *how* those crimes should be *punished*. The answers to these questions are more fundamental, because they are also answers to the question of what politics is and is for. Another way of saying this is that the constitutional question, the question of whether and how the powers of government are separated, is a question of *means*, while the question of how the laws and mores inform liberty is a question

of *ends*. The answer to the question of book 11, namely separation of powers, is a kind of *petitio principii*, or begging the question, because separation of powers is meant to promote political liberty that is defined as the opinion of security (11.6, ¶3), whereas the purpose of book 12 is largely to argue that very point, that political liberty is the opinion of security; book 11 is about how one is to be judged, but book 12 is about what one should be judged for. Book 11 is about how best to achieve the political good, but book 12 limits and defines that political good. We turn to it in the next chapter.

CHAPTER 3: PUNISHMENT AND PROPERTY

Introduction

Book 12 is of central importance because it ties together property and liberty in what is felt or experienced by the individual. The description of liberty as *felt* is not imprecise or arbitrary, nor is the feeling itself arbitrary, although it is relative to other factors. Montesquieu focuses in book 12 on the individual's own sense of vulnerability, his sense of being subject to the power of other individuals and liable to judgment and condemnation by them for secret things—opinions, thoughts, sins, beliefs. The definition of liberty as the "opinion of security" (12.1, 12.2) is thus connected essentially to the privacy of conscience, to one's inner life, to one's psychological freedom to exist apart from the community and even to hold opinions or beliefs that are not consonant with common opinion and orthodoxy. The way Montesquieu makes this argument is both narrower and wider than how I have here summarized it: narrower, in that it seems to be merely legal, arguing that punishments should accord with the nature of their crimes; and wider, in that his descriptions of despotic and moderate laws and punishments are of universal political and spiritual application, and are not only about how politics should deal with religion. Religion is the theme underlying all of book 12, and, given Montesquieu's claim that the subject of book 12 is "of more concern to mankind than anything else in the world" (12.2, ¶4), one imagines that religion must be a central concern of *Spirit* as a whole.

This far-reaching claim can be borne out only through an analysis of the book as a whole, and subsequently, an account which connects book 12 to its context in part 2, and then to the rest of *Spirit*. This is difficult to show because Montesquieu has presented his

arguments in such a way as to make judgment of guilt, and especially religious judgments of guilt, fade into the background and acquire the qualities of invisibility and insensibility. That is, he has made his work reflect what he prescribes for the laws: the most terrifying powers must not be wielded obviously, should not be brandished openly. Just as in book 11, Montesquieu neatly presented the judicial power as something temporary, hidden, and impersonal; in book 12, and in *Spirit* as a whole, he obscures, except in a few brief but shocking moments, how terrifying to the individual spirit the public pursuit of the good can be, both to those who pursue it publicly, and to those who run afoul of that pursuit.

We will focus especially on the central part of book 12, on crimes and their punishments, where the ever-implicit questions are: what is a crime, and how should each crime be punished? The sources to the answers to these questions are "mores, manners, and received examples" (12.1). One of the objectives of this chapter is to connect these sources to religion. After this account of book 12, the chapter will turn to part 3 of *Spirit* and show why it follows part 2: its purpose is to describe barbarian mores in contrast to Christian or Roman mores, and thus to describe the different possible sources of political liberty, or in other words the different ways of understanding crimes and their punishments.

The different parts of *Spirit* treated by this chapter are united in a hidden way. Montesquieu introduces barbarian mores in part 3 as an alternative to the mores that in part 2 were seen at times to have been inimical to liberty. If book 12 is secretly about the Christian religion, part 3 is secretly about pre- and possibly post-Christian alternatives to Christianity. However, Montesquieu doesn't present it this way because to do so would be not only unnecessarily strident but also confusing. The real distinction at the heart of this transition from part 2 to part 3 is that between political and civil law, and the question of

how they relate to each other. That question, in turn, turns on the question of what property is, and what it is for. Montesquieu needs to establish this question before the parts of *Spirit* on commerce and religion because the question of what property is, and what it is for, is crucial in both of those areas. In Montesquieu's account of commerce, the portability and fungibility of property is of great importance, and in his account of religion, he relies on the opinion of security, effected through property understood as privacy of conscience and a limit on the good that religion achieves politically. Each of these turns, that in commerce and that in religion, has the barbarian mores of part 3 at its root.

Political Liberty vs. Civil Liberty

To understand the difference between books 11 and 12, on "the laws that form political liberty in its relation with the constitution," and "the laws that form political liberty in relation to the citizen," respectively, it is important to separate this distinction from the distinction between political right and civil right. It might seem from its focus on the citizen that book 12 would be about civil liberty, while book 11 is about political liberty, but in fact both are explicitly about political liberty and *not* civil liberty. In addition, the difference in focus between the constitution in book 11 and the citizen in book 12 seems to suggest that book 11 is about fundamental laws and book 12 about derivative ones, book 11 about the regime and book 12 about the laws made in accordance with, or against the principles of the regime. The constitutional questions of book 11 would thus appear to be primary, and the legal questions of book 12 secondary. But this is also not the case.

In fact, for Montesquieu the questions of both books are derivative and secondary, as

law and politics arise out of the peoples they serve, and not the other way around.[147] Another way of saying this is that the mores and manners of a people—what moves them profoundly—is more fundamental to the spirit of the laws than the laws that emerge out of this fundament or are superadded to it. Those things that make up the spirit of the laws are of greater importance than the mere laws themselves, and there is little that those unadorned laws can do by themselves to counter the mores of the people. Nevertheless, Montesquieu does, with the figure of the legislator, indicate in several places, including in the culminating chapter of part 3, that the spirit of the laws can change, and can be changed. That spirit is touched more immediately by the criminal laws which are the focus of book 12 than the constitutional laws which are the focus of book 11, and in that sense, paradoxically, what the constitution does for liberty is less important than the "civil laws" which "favor" liberty in accordance with "mores, manners, and received examples" (12.1). The constitutional protections of liberty afforded by the arrangement of separation of powers appear in this view to be inessential to liberty itself; a constitution may exist or be established with a view to "political liberty" (11.5) in general, but it is at least insufficient if not also unnecessary for the more substantial political liberty that is felt, or "enjoy[ed]" (11.6) by the citizen, and especially for the even more profound civil liberty which can only be found in the strength of spirit of each man and woman who is part of a people. The constitution forms a sort of broad outline of the possible, and laws can be made more or less in agreement with the spirit of liberty, but neither of these *are* what liberty *is*: as will be seen, for Montesquieu liberty is something moral, not merely legal, a condition of the soul that emerges out of strength of

[147] Not decisively, at least. See below and 15.8, ¶4: "Because the laws were badly made, lazy men appeared; because these men were lazy, they were enslaved."

character, out of the virtues and habits of individuals. However, Montesquieu's civil liberty concerns the individual's freedom under the law, and is to be distinguished from any apolitical "natural liberty"—the province of "savages," not "barbarians" (11.5; see 18.11)—and consequently Montesquieu's descriptions of liberty focus on the soul or spirit of the citizen and not the man. However, it is not as if one is to imagine the human being, with a character naturally disposed or indisposed to liberty, placed into a civil and political context which may stifle or encourage that liberty; Montesquieu's description in part 3 of the characters and hearts of men is not merely of those shaped by nature, but of men shaped by laws. He describes a reciprocal relationship of laws and characters or mores, with the former much easier to change than the latter.

Another way of getting at these questions through the material of this chapter is to read the movement from parts 2 to 3 of the *Spirit* as a backwards progression from constitutions to their roots in mores, and especially from the English constitution to its roots in barbarian mores, in contrast to the kinds of mores that have supported slavery and despotism. Part 3 is about the origins, ostensibly in climate and terrain, of various laws, but it is really about the characters and spirits of peoples for whom laws are made. Montesquieu's apparent embrace of determinism through the suggestion that different physical circumstances give rise to different kinds of laws, especially about slavery, actually provides him a means of talking about the freedom or servitude of the soul.[148] This freedom he sometimes calls "the liberty of the man" as opposed to "the liberty of the citizen" (e.g., 18.14), and is what at other times is called civil right or civil liberty. This leads to an obvious confusion: the political liberty of the citizen is not the same as civil liberty or civil right. In

[148] Cf. Samuel, 310–12.

fact, read in the context of part 3, civil liberty appears to be liberty strictly speaking, whereas political liberty, including that of the citizen, appears as a kind of sign or consequence of civil liberty, meant only to serve and enshrine the freedom of the man, or individual.

Political Right vs. Civil Right

To clarify these distinctions further, one should look to other places where Montesquieu describes the political and the civil. In the chapter "On positive laws" in the first book, Montesquieu describes "political right" as the relation of the governed to the governors and "civil right" as the relation between citizens (1.3, 7). However, at the end of that chapter, in an opaque passage earlier cited, he disclaims any responsibility for separating "political from civil laws" (1.3, 9) on the grounds that he is treating "the spirit of the laws" and not "laws" themselves, and thus is more concerned with the relations between the principles and the various topics and circumstances which are the material of the books which make up his treatise.[149] The "natural order of the laws" is of course that a constitution, written or otherwise, precedes and pre-exists civil laws made by the authority of that fundamental law, but the fundamental law does not come out of nothing; it has some relation to preexisting mores, customs, manners, examples, and laws. The last paragraph of that chapter further suggests that Montesquieu sees his work as the identification of a ground or "source" of the laws that is more natural than "the natural order of the laws." It would be not entirely presumptuous to suggest that this ground more natural than nature is what we call "History," given that the components of the spirit of the laws which give Montesquieu the

[149] See Céline Spector, "'Il faut éclairer l'histoire par les lois et les lois par l'histoire': statut de la romanité et rationalité des coutumes dans *L'Esprit des lois* de Montesquieu," in *Généalogie des savoirs juridiques: le carrefour des Lumières*, ed. M. Xifaras (Bruxelles: Bruylant, 2007), 5–6; and Schaub, "Montesquieu's Legislator," 163–64.

principles from which all else "flows" include, among many other contingencies, "their origin."

This consideration aside, and to the end of understanding what Montesquieu means and what he does not mean by separating the political liberty of the constitution and the political liberty of the citizen, we must further attend to the distinctions between political and civil in this chapter. Political laws are constitutional; they "form" the government. Civil laws, on the other hand, "maintain" it (1.3, 8). However, both political and civil laws are in the domain of political right, which concerns, as was stated, the relations between the government and the governed, and thus all positive law.[150] The political right is, fundamentally, the government. However, government is unique to each people and is in some way rooted in the qualities of its people. Montesquieu quotes from *Origines juris civilis* of the Italian legal theorist Giovanni Gravina: "The union of all individual strengths… forms what is called the POLITICAL STATE."[151] He goes on to distinguish, in a way superficially similar to Hobbes, between the placement of that union of strengths in *"one alone* or… *many*" (emphasis original). The resemblance to Hobbes is superficial because Montesquieu adds that "the government most in conformity with nature is the one whose particular arrangement best relates to the disposition of the people for whom it is established." That is to say that a despotism, for example, would be ill suited to a strong people, while a republic would be ill suited to a weak one. "Laws should be so appropriate to the people for whom they are made," Montesquieu writes, "that it is very unlikely that the laws of one nation can suit another." One can see clearly from this that the laws—even and especially the

[150] Excepting revealed, divine law.
[151] Capitalization in original.

fundamental laws—are preexisted by the character, or strength, of the people.

That strength, in turn, forms the strength of the nation or the government; the question of 'who rules' is best answered by the question of 'who is strong': to crudely simplify the possibilities, if the people are strong, then they will rule themselves; if they are not, they will be ruled by a despot. Considering the relation between political right, the political state, and political law in this way, we can see what it means that book 12 is "on the laws that form political liberty in relation to the citizen." If the origin of liberty, considered in the context of government, is the strength of the individuals who make up the state, neither the constitution nor the criminal laws in a free state should put the citizen in a powerless position, one where he feels that he lacks strength, or is at the mercy of another. Montesquieu describes the separation of powers in book 11 and makes prescriptions for criminal laws in book 12 with this end in mind.

While the political state is a union of strengths, the civil state is "a union of wills" (Montesquieu again quotes from Gravina). What the civil state could be apart from the political state remains obscure if we cannot imagine that the government which is the union of the strength of individuals does not also act, at least abstractly, in the Hobbesian or Lockean sense, in accordance with the will of each. Montesquieu again mentions the will (*volonté*) in the second chapter of book 12, writing, "Philosophical liberty consists in the exercise of one's will, or at least… in one's opinion that one exerts one's will." This is the immediate prequel to his presentation of his definition of political liberty as security or "the opinion of security." Montesquieu thus indicates that the individual's liberty is ensured on a political level through his strength and sense of safety—we will see the origins of that in part 3 with the barbarians—but on the civil level it is through a sense that he is free and that he

makes his own decisions.[152] This more personal of liberties, what could be called 'individual liberty,' is represented by property. That individual liberty can be further differentiated between one's sense of oneself in relation to others, what we might call 'identity,' and one's sense of oneself in relation to oneself, which is how Montesquieu understands the "conscience."

Conscience will be treated further in Chapter 4. However, to see more clearly the relation between political and civil right in terms of liberty and property, once the meaning of these terms have become more fleshed out through the parts on mores, commerce, and religion, we turn to two chapters in book 26, "That things that depend on principles of civil right must not be ruled by principles of political right" (26.15), and "That one must not decide by the rules of civil right when it is a matter to be decided by those of political right" (26.16). This book is one of the most significant in all of *Spirit*, as it promises an account of the relation between the laws and mysterious "order of things" which makes up the spirit of the laws (26, title; 1.3, 9).[153] As the final book in the part of *Spirit* on religion, it connects what Montesquieu has said about religion to the other parts of the book, but also looks forward to part 6 and the questions of succession and inheritance which are so important for understanding the French monarchy: a long way around indeed to placing himself amid the Boulainvilliers-Dubos debate.

These two chapters establish for the first time in the work in clear terms the distinction and proper relation between political right and civil right. Nevertheless, Montesquieu's description is not without confusion. The point of central importance, which also affords

[152] See 19.27, ¶4.
[153] Schaub, "Montesquieu's Legislator," 155.

the greatest opportunity for confusion, is that the public good is liberty. This is confusing from a natural-rights perspective, where liberty is the natural condition of mankind, and government and laws properly should only enshrine or protect that liberty. Montesquieu's manner of presentation seems to contradict the natural rights thesis, reversing the order of things: "As men have renounced their natural independence to live under political laws, so they have renounced the natural community of goods to live under civil laws. These first laws acquire liberty for them; the second, property."[154] The implication would seem to be that man does not have natural liberty, but that it is granted to him by government. However, we saw earlier that Montesquieu distinguished between "natural liberty," "independence," and "political liberty" (11.5). The first is characteristic of the "savages" that Montesquieu later distinguishes carefully from the barbarians (18.11). The latter is what is achieved by the constitution of England and by moderate monarchies. Independence, presented in the context of the purpose of states in 11.5, and not in terms of nature, is characteristic of states that very much lack political liberty. It seems that what Montesquieu means here by "natural independence" is rather equivalent to what Hobbes and Locke mean by natural right: each man is a self-ruler,[155] and must obey nothing and no one but necessity.[156] However, this state of nature is oppressive; it has many dangers that do not allow man to enjoy his natural independence, and he must submit to a power other than himself. In Hobbes and Locke this independence in the state of nature is largely conflated with what Montesquieu here calls the "natural community of goods": man has a right to all

[154] The Cambridge translators (Cohler et al.) have mistakenly rendered "*indépendance*" here as "dependence" (26.15, 510).
[155] See 19.27, 332: "As no citizen would fear another citizen, this nation would be proud, for the pride of kings is founded only on their independence."
[156] *Leviathan*, 13.13; *Second Treatise*, 8.95.

things, but he must give up this right in order to be able to enjoy his property. There is much less a sense in Montesquieu than in the work especially of Locke that man has a natural property that preexists and is protected by the political order. Nevertheless, the consequence of Montesquieu's argument is that there is no public good outside of the good of individuals, which is their property: he argues that "it is never in the public good for an individual to be deprived of his goods" (26.15). He is in full agreement with the natural rights teaching. However, Montesquieu presents this agreement circumspectly because his purpose is to make the argument very carefully that rule over others is not a form of property and thus may not be inherited. This argument obviously runs against the grain of the French monarchy. In order to make this argument he must therefore present the relation between political right and civil right in such a way that it is possible to read these chapters as saying that both liberty and property are granted by the crown.

Nevertheless, the implication of chapter 16 of book 26 is that political succession should not be decided by the rules of property; it cannot be "alienated." Montesquieu dodges the charge that he is criticizing the tradition of family inheritance of the French crown by arguing that it is good in monarchies for the order of succession to be fixed, so as "to avoid the misfortunes that… occur in despotisms where everything is uncertain," but in so doing he says that this order is "founded on the good of the state," and that "it is in the interest of the state for there to be a reigning family." That is to say that the rule that comes with the crown, or "the domain," does not belong to the family that holds it as a kind of property. He writes:

> The law which regulates the inheritance of individuals is a civil law, which has for its purpose the interest of individuals; that which regulates succession to monarchy is a political law, which has for its purpose the good and the

preservation of the state. (26.16, 512)

Montesquieu goes on to say that it is the political law that establishes a principle of succession to rule, and thus that succession cannot be determined according to a civil law that is subordinate to that political law. Consequently, the civil laws of other societies, including the Roman civil laws, are irrelevant for a society under a different political law. (Montesquieu hereby rejects a central principle of French jurisprudence, which proudly bases its laws on the authority of the Roman *Corpus Juris Civilis*.) One must read these statements together with the descriptions of political and civil law from the previous chapter. The "domain of a state" is distinguished from what can be inherited according to civil law as "the liberty of the city" is distinguished from "the property of the city" (26.16, ¶1). That is to say that the rule belongs to the people, and that succession to rule is for the sake of the political liberty of the citizen, which is used to protect the individual's property. This is why Montesquieu writes that "it is never in the public good for an individual to be deprived of his property," and that if "the public needs an individual's land," it "considers each individual as the whole city" (26.15).

Montesquieu there describes property as a "*palladium*": it protects the individual from the terrifying prospect of the public power being used against him. It is through this image that we can begin to see how Montesquieu understands the relation between the political and the civil, and connect what he argues about the liberty of the constitution in book 12 to the liberty of the citizen in book 11, and each of these to the mores and manners which sustain them. Property is a kind of shield, even something sacred, like the image of Athena in

Troy, which protects the one who has it.[157] But what does it protect and what does it protect from? Montesquieu writes:

> What should be decided by the laws of property should not be decided by the laws of liberty which, as we have said, is the empire of the city alone. It is a fallacy to say that the good of the individual should yield to the public good; this occurs only when it is a question of the empire of the city, that is, of the liberty of the citizen; it does not occur when it is a question of the ownership of goods because it is always in the public good for each one to preserve invariably the property given him by the civil laws. (26.15, 510)

Here Montesquieu equates "the empire of the city" with "the liberty of the citizen," or rule with liberty. That rule is based on individual strength and self-rule; men "renounced their natural independence to live under political laws," which "acquired liberty for them." Thus it is only when that strength and that rule are in jeopardy, when the state, which here means the collective independence of self-ruling individuals, faces an existential threat, that the property of individuals should be threatened. Just as the strong and independent individual could protect himself and thus live as a free person, the strong and independent city or nation can protect itself and live free of subjugation. But just as that strong, independent, and free person must furnish himself with means of assuring his protection, not only arms but also a place of refuge like a house, the city or nation must have these means as well. The latter serve the former; that is, property serves liberty, keeping the free person and the free state free. Thus it is a "fallacy" to say that "the good of the individual," when that good is the individual's property, "should yield to the public good," when that good is the property of the public. But more importantly, it is also a fallacy to say that the individual's property should yield to the public good when the public good is political liberty. Political liberty

[157] Schaub, "Montesquieu's Legislator," 164, writes that as Constantine appropriated the *palladium* for Constantinople, for the protection of the city, Montesquieu appropriates it for the protection and sanctification of the individual.

cannot be served by taking away private property, because that private property *exists in order to protect* political liberty. This is why when it is necessary for an individual to give up his land for the public good, even when that good is the preservation of political liberty, the public "must pay compensation," and moreover must act "like an individual who deals with another individual" (26.15, ¶6); that is, according to civil law and not according to political law.

It is significant that upon making this point, Montesquieu summons for an example "the peoples who destroyed the Romans," who, after their conquests, were "called… back" to "fairness" by "the spirit of liberty": they preserved the right of property, and even compensated property-owners whose land had to be used in order to build new highways (26.15, 511). "In those days," he writes, "the determination was made according to the civil law; today it is made according to the political law." The contemporary French law, Montesquieu implies, is rooted in the disordered principles of the conquered Romans (cf. 26.16, 512), whereas those who conquered the Romans (i.e., the Germanic barbarians) had truer, more moderate principles. Montesquieu borrows from those principles in his description of property as a "palladium": it is as such a shield that property is understood by the barbarians. In order to show this, and as preparation for accounting for what must be protected, which we will see in the rest of book 12, we turn now to part 3 for the barbarian understanding of property.

From Part 2 to Part 3

Part 3 consists of six books. The first four are about climate, and the latter three of those about slavery or servitude. That is to say that all of the slavery books are connected to

climate. We will not treat these books extensively here except to say that Montesquieu establishes with this connection a tether between material conditions and moral conditions such that there are climates which are more susceptible to slavery and to slavishness. The determinism of this account is superficial, for Montesquieu in effect says that some places are more determined than others, and thus more in need of proper moral causation, that is, legislation.[158] This is to say that things like slavery are not made necessary and especially are not made just because the climatic conditions lend themselves to them. To say that the moral environment is more determined in some places in others is in effect to say that moral causes are not simply determined by physical ones. At most it means that some places present greater challenges to the legislator who wishes for there to be good education and good laws (14.3, ¶3). Even this seems to be too strong a statement, however, for it is not as if the cold climates do not present their own challenges: because these climates make people moderate without education and laws, their peoples tend to be without education and laws (14.3, ¶4).

Montesquieu distinguishes in book 14 between hot and cold climates and the effects they have on what he calls "the character of the spirit" and "the passions of the heart" (14.1). To simplify his argument here crudely: the hot climate is bad; the cold climate is good. Montesquieu's account here of the effect of the climate on the spirit and the heart is useful for understanding how he thinks about the soul and how he thinks the legislator

[158] Cf. Samuel, 312, who notes that Montesquieu allows that legislation can counter the strong physical determinism of the climate, or, to a lesser extent, of the terrain, but ultimately holds part 3 to be the strongest determinist moment in a dialectic between freedom and determinism that takes place over the course of the whole book. Her brief mention of the barbarians of book 18 as precursors of political liberty (312, n18) as exceptions who did allow themselves to be determined by the terrain, begs the question, for if it is legislation that can counter climatic despotism, how does one account for barbarian freedom?

should think about the soul: "laws," he writes, "should be relative to the differences in these passions and to the differences in these characters" (14.1). Hot conditions make the heart weak, which makes the passions the heart experiences very strong. In cold climates, by contrast, the heart is strong, and consequently the passions it experiences are weak. Furthermore, hot climates make spirits timid, lacking in courage (14.2). Regarding timid spirits another seeming "contradiction" arises: those with timid spirits have an atrocious character, which leads them to do the most ghastly things (14.3; 12.4, 190). Cold climates, on the other hand, engender courageous spirits which make the character confident, slow to move, and gentle.

Montesquieu's account of climate is obviously more favorable to the colder climates. However, he wishes to prejudice us in favor of the Germanic barbarians who lived in those climates because of the consequences these passions and characters have on criminal law. Criminal law had been treated in book 12. There, Montesquieu emphasized the importance of maintaining the distinctions between "four sorts of crimes," against religion, mores, tranquility, and security (12.4). He argues that for each sort of crime, "the penalty" should be "drawn from the nature of the thing"; for instance, a crime against religion, or "sacrilege," should be punished by "deprivation of all the advantages given by religion" (12.4, 189–90), and should not be treated as a crime against security, or punished as if it is. Montesquieu dwells on this point at length in this chapter in particular, but in fact throughout all 30 chapters of book 12: they are all concerned with the questions of religion and how different religions may lend themselves to the conflation of these different crimes and their penalties. With each kind of crime, Montesquieu focuses on the idea of secrecy and what is hidden, and what is necessary in each case in order to investigate and punish the crime. This is true

especially of chapter 4, where he argues that one should not look into "hidden sacrilege" because this "destroys the liberty of citizens by arming against them the zeal of both timid and brash consciences." However, it is also a theme for subsequent chapters, which treat accusations, inquests, and conspiracies.

Montesquieu is concerned with looking into what is hidden because of the effect that this has on the soul. Too deep an inquiry into something private, secret, and sacred has a disastrous effect on liberty. The paradigmatic example is an investigation of belief. It is less a question of whether one could prove that someone believes or does not adhere to orthodoxy that makes this kind of investigation problematic; rather, it is that such investigations inflame the passions and have a profound and liberty-destroying effect on impressionable people. Montesquieu's example is not so much a matter of impiety as it is a question of harms and vengeance, or crimes and punishments. In response to actions that "wound the divinity," people may imagine that "the divinity must be avenged." Montesquieu gives the following example:

> A Jew, accused of having blasphemed the Holy Virgin, was condemned to be flayed. Masked knights with knives in their hands mounted the scaffold and drove away the executioner in order to avenge the honor of the Holy Virgin themselves... I certainly do not want to anticipate the reader's reflections. (12.4, 190)

This zealous action is "what this idea of avenging the divinity can produce in weak spirits": a great indignation and a righteous fury that cannot be sated: "If men's laws are to avenge an infinite being, they will be ruled by his infinity and not by the weakness, ignorance, and caprice of human nature." We see from these descriptions that questions of the weakness or strength of spirit are tied to the proper relation between criminal laws and penalties. Book 12 is framed by the definition of liberty as the opinion of security (12.1–2), and accordingly

focuses on fear. Those laws are destructive of liberty that do not furnish the opinion of security but instead promote fear. Consequently it is very important for a legislator to understand what causes fear and what assuages it. But if weak spirits with strong passions are liable to commit atrocious actions in the name of avenging the divinity, imagining great slights to have been committed through speech, and bringing their own strength to bear to aid the public in prosecuting blasphemers, what about strong spirits with weak passions?

Montesquieu makes this picture more complete in part 3. Most interestingly for our purposes, he describes the "calm" passions of "[o]ur fathers, the ancient Germans" (14.14). Unlike the legislation of the passionate Southerners of hot climates, the laws of the Germans "found in things only what they saw, and they imagined nothing more." These barbarians had no conception of "wounding the divinity": they "judged insults to men by the size of the wounds." However, when the same peoples moved to Spain, their laws, which previously "did not punish the crime of the imagination," changed dramatically: "[t]he imagination of the peoples was fired, and that of the legislators was likewise ignited: the law suspected everything in a people capable of suspecting everything."[159] Thus Montesquieu presents to us the dimensions of the souls for whom criminal law is made, and how those souls can be affected differently by the law. In book 12 he had asked the questions, 'what is treason?'; 'what is the state for?'; and more directly, 'what is a crime?'; and 'how should different crimes be punished?' If the consideration of the criminal law in being productive of liberty is that it must ensure the opinion of security, we must understand not only the legal arrangements that are most likely to accord with that opinion, but also the spirits and the

[159] These Germanic mores are still superior in hot climates to Christian mores in the way they inform criminal law. Montesquieu writes, "[I]t seems that in their punishing they thought more of gratifying individual vengeance than of exercising public vengeance" (14.14, 244; cf. 12.4, 190).

hearts that give rise to that opinion. That is to say, the movement from part 2 to part 3 is a movement from the law to what is sometimes called 'the regime,' or from the formal freedom of the individual as produced or guaranteed by the state to the moral freedom of the individual as produced in the soul. The latter is a prerequisite for the former, and thus Montesquieu moves backwards. We reiterate what in book 11 he wrote of the English, those unhappy English, that "[i]t is not for me to examine whether at present the English enjoy this liberty or not. It suffices for me to say that it is established by their laws, and I seek no further" (11.6, 166). In book 14 those same English are seen to be, as a result of their climate, a dreary and even suicidal people (14.12, 13). But turning one's unhappiness within is much better than being "allowed to blame any one person for causing their sorrows" (14.13).

Let us restate the connection in light of the prior examination of political and civil right and law. The proper relation between political and civil that emerges in book 26 is such that the civil right to property is a *palladium*, shielding the individual from the public power (26.15). His liberty in the deep, spiritual sense is the core that is to be protected, and his private property serves as the buffer between that internal and personal feeling of freedom and security and the power of the law over him. We will come to see even more through a treatment of the later books of part 3 that Montesquieu especially favors that character of spirit and those passions of the heart that are associated with cold climates and the Germanic barbarians who inhabited them: individual strength, courage, and simplicity. In book 18 he will leave aside climate for the question of terrain and the cultivation of the land in order to emphasize the understanding of property of the Salic barbarians as opposed to how property is understood by other peoples. This is in order to promote an understanding

of property as just such a *palladium* and to attach that understanding to that spirit and heart most conducive to liberty: the powerful individual whose sense of identity and title to rule comes from his own strength, and not from a comprehensive public teaching of the good or any thoroughgoing national unity. In the next and final chapter we will treat of how Montesquieu adapts the commerce and religion of these peoples to the modern, Christian context. However, the root of his treatment of commerce and religion, especially as adaptations from barbarian mores and law, is property as the medium between the individual, considered in his most internal, personal dimension, as a being with a heart and a spirit subject to passions and shaped into a character, and the law which judges his guilt and can bring the most terrifying power to bear in punishing him. Property in the material sense, as real estate or movable goods, is that *palladium* which in book 26 Montesquieu says should never be wrenched from an individual by the state acting as the state in the interests of political liberty; it protects that individual, moral liberty which is at the core of one's opinion of his own security. That kind of property is to be considered sacred because it stands in for and protects the more truly sacred property that is the individual's conscience: the law should not be employed in criminal law such that it distorts the spirit and deforms the character.

Given these considerations of the relative purposes of part 2, which consists of books 9–13, and of part 3, which consists of books 14–19, the separate purpose of the as-yet-unmentioned book 13 may come to light. The book seems out of place, wedged as it is in between the dramatic book 12 on crimes and punishments, and book 14 on how climate shapes the soul. Book 13 is about property in the tangible sense: "On the relations that the levy of taxes and the size of public revenues have with liberty"; it is the analogue in the

structure of the book for property in the structure of Montesquieu's thought: property stands as a buffer between the power of the state and the good of the soul. Questions of taxes and revenues are not merely practical, they are moral. The revenue of a state, Montesquieu writes, is "a portion each citizen gives of his goods in order to have the security or the comfortable enjoyment of the rest" (13.1). Thus taxes are the tangible property one gives up in order to enjoy spiritual property, and those taxes should be used for what is necessary in order to secure that property. Montesquieu contrasts these real needs with "imaginary needs," among which are "the passions and weaknesses of those who govern, the charm of an extraordinary project, the sick envy of vainglory, and a certain impotence of spirit in the face of their fancies." Montesquieu's work does not aim to cure these spiritual maladies of princes directly, but to insulate the individual from them indirectly. In book 13 he writes, "There is nothing that wisdom and prudence should regulate more than [taxes]," and in book 21 he writes that due to the invention of letters of exchange, "it turned out that great acts of authority were so clumsy that experience itself has made known that only goodness of government brings prosperity" (21.20, 389)

This indirect solution to the protection of property from the avarice or passions of princes is only necessary, however, because princes tend to go after the property of their subjects as the most direct method of influencing and punishing them. That is to say, the discussion of taxes is a discussion of the threats to liberty. In many cases that kind of punishment could be appropriate and productive of liberty, while in other cases it would be inappropriate and destructive. In order to see this we need to turn to a closer examination of book 12.

Book 12: Crime and Punishment

As we have said, the purpose of part 3 is to introduce the background questions of property and civil liberty which inform the political liberty of the constitution and of the citizen. We have already treated book 11, on the constitution, and turn now to book 12, on the citizen. The political liberty of the citizen is closer to the soul—the heart and the spirit—than is the political liberty of the constitution, but it is still a formal liberty rather than that which is experienced internally by the free person. It is with these considerations that Montesquieu opens book 12. In the first chapter he contrasts the topic of the book with the topic of book 11, but also looks forward to part 3 and beyond: "Only the disposition of the laws, and especially of the fundamental laws, forms liberty in its relation to the constitution. But, in the relation to the citizen, mores, manners, and received examples can give rise to it and certain civil laws can favor it, as we shall see in the present book" (12.1). In book 12 we see the laws which can favor liberty by creating the proper relation between the harm that a crime does and the punishment that is levied for that crime, but beyond those Montesquieu is ultimately interested in the "mores, manners, and received examples" that "give rise" to those same criminal laws which either do or do not make him, or leave him, with his freedom. This is what we mean by saying that the considerations of part 3 are prior to those of part 2. Furthermore, the topic of book 12 is more fundamental than that of book 11, even though Montesquieu writes that it is especially the "fundamental laws" which form constitutional political liberty. This is because "[i]t can happen that the constitution is free and that the citizen is not," or vice versa (12.1, ¶1). The citizen's actual freedom or lack of freedom, as opposed to the freedom afforded by the constitution, is affected by criminal laws, the topic of book 12, but these are in turn made what they are because of the mores and manners of

the people, the implicit topic of part 3. The concluding paragraph of the first chapter further indicates this through the assertion that it is usually the case that the people are less free than their constitution allows, suggesting that it is rare for a people "to be free in fact and not by right" (12.1, ¶3). It seems from this that while a free people will inevitably give themselves a constitution and laws which support that liberty, it is not unlikely that a people—for instance, the English—will enjoy less liberty than that afforded by their fundamental laws.

It is helpful to pause here in our analysis to reflect on whatever implications these arguments may have on the questions of the role of nature and history in politics. The notion that freedom arises primarily out of mores and manners seems to anticipate Hegel's notion of the *Sittlichkeit*, or the customary or traditional ground of our ethical life, or moral freedom.[160] To the extent that those mores and manners are different in distinct places and times, and seem to be formed irrationally, though not without reason (Preface, ¶9), Montesquieu would seem to be prefiguring the Hegelian notion of History as a rational process that drives the emergence of freedom. Even though Montesquieu gives no indication that there is any kind of rational, comprehensive, and thoroughgoing historical process, he does seem to double down in part 6 on the importance of history in the origin and revolution of different mores, manners, and laws. When we read these portions of his work together with the way he presents the English constitution as a way of ordering politics that reason did not discover according to its principles, but which we have found, without

[160] See Paul Thomas, "Property's Properties: From Hegel to Locke," *Representations* 84, no. 1 (November 2003): 30. Thomas only mentions Montesquieu in the first paragraph, but there claims that the notion of the *esprit générale* is found in each element of Hegel's tripartite division—family, civil society, and the state—in *Philosophy of Right*, and that for Hegel, the universality that arises in the form of the state out of the dialectic between the family and society is akin to the notion of the general spirit or will in Montesquieu and Rousseau. See also Riley, "General Will," 506.

our own efforts, because history has shown it to us, we might be left with the impression that Montesquieu has done more than indicate a philosophy of history, and be inclined to believe that he has gone nearly all the way to full-blown historicism. But we would be mistaken. To understand fully how mistaken this reading is, we need to understand Montesquieu's teaching on the legislator, a teaching which is fully compatible with the tradition of political philosophy from Plato to Machiavelli, which holds that the philosopher and writer can understand at any point in history the whole of what makes a people and its laws.[161] Hegel, by contrast, argues that understanding is possible only at the end of a rational process of history. Montesquieu's understanding is just as alien to this argument as Plato's or Machiavelli's.

A different question than Montesquieu's place among the political philosophers is his place among modern political theorists. To speak of the order of the laws such that the constitution is derivative from the moral condition of the people is not in any way to contradict the natural rights liberalism of Locke and the American Founding. It is in fact to affirm it. For the argument of these is that government, through a fundamental constitution, does not grant the people liberty, but protects the liberty that they have from nature. Given this natural rights basis, certain positive laws follow; the American Constitution could be otherwise and still be consistent with the principles of the Declaration of Independence, but it could not be a despotic constitution. Given a constitution that affords political liberty, however, it is possible for a people that is not free in the moral sense to create criminal laws which do not protect freedom. A constitution based on natural rights is no guarantee that its

[161] See Preface, ¶¶1, 6, 9, 13, and 16 with 29.16–19, 4.6, 19.5, and *Pensées*, 944 and 1795. See also the Conclusion, "History and Prejudice," below.

citizens would respect natural rights.[162]

The overt emphasis of book 12 is not the sub-legal and sub-rational: it is the legal, though not necessarily the rational. However, the question of the mores, manners, and received examples which give rise to the legal forms which affect political liberty through criminal laws runs through the book. It is religion that undergirds these questions. Montesquieu treats all of the different crimes he distinguishes in terms of religion, and as he proceeds through the book, he moves increasingly to what is private, what is hidden, and what is secret, that is, to what any spiritual religion, and especially Christianity, is concerned with. It is not simply religion that is the implicit focus, but Christian religion, for it is Christianity that is concerned above all other religions with what is hidden in the heart, and it is this concern for what is hidden that Montesquieu ties to illiberal political orders and contrasts with the barbarian mores in part 3. He presents criminal law in part 2 in a way that implicitly opposes the influence of mores associated with Christianity and favors mores which come from elsewhere, but does not present those mores to us systematically until part 3. With the presentation or recovery of those old mores which must be at the root of a new understanding of criminal law, he implicitly favors a new understanding of religion. We

[162] This distinction, between the formal recognition of natural rights, and the embodiment of liberty in the virtues and habits of the people, is at the root of debates between the modern liberalism represented by Locke and the Founders, and the conservatism represented by Edmund Burke. Thinkers aligned with the latter emphasize customs and traditions which support freedom, including local, familial, religious, and national attachments, but they are not antithetical to natural rights principles; rather, they argue that thinkers along the lines of Locke and the American Founders are insufficiently attentive to those customary forms which are the real ground of liberty, and overemphasize philosophic principles which, if carried to their logical conclusion, would undermine that ground. An even further contrast is drawn between Burke and the purportedly more conservative American Revolution, rooted in the purportedly more conservative Scottish Enlightenment, on the one hand; and the more liberal and radical French Revolution, rooted in the more idealistic, less rooted French Revolution, on the other. For a strong, mostly convincing critique of this argument, see Rasmussen, *Pragmatic Enlightenment*, 193–94, 294–301, who is more successful at showing the radicalness of Hume and Smith than at showing the groundedness of Voltaire and Montesquieu; concerning the latter, he overstates his case that his argument for liberalism was thoroughly practical, concrete, and empirical.

return now to the book in question, where we will see these considerations borne out.

After giving his famous definition of liberty as "the opinion one has of one's security" (12.2; see 11.6, ¶3), Montesquieu turns immediately to those things which threaten one's opinion of security, namely "accusations," and thus, he turns his attention to criminal law, which deals with accusations and the outcomes of accusations. He writes, "The knowledge… concerning the surest rules one can observe in criminal judgments, is of more concern to mankind than anything else in the world" (12.2, ¶4). This is a remarkable statement: he does not say that this knowledge is the most important thing to know for politics, or qualify it in any other way;[163] he writes that this knowledge concerns us more than anything else (*intéressent le genre humain plus qu'aucune chose*) (cf. 6.2, ¶1)—even more than the truth, even more, perhaps, than what might lead to our salvation. Some choice, few individuals may genuinely care about wisdom or virtue, but everyone wants to feel secure. We must live under government in order to be secure, but the very power of government that provides us that security may be used to hurt us. However, this need not destroy our opinion of security, for if the laws are such that they can be followed by most, and one is prosecuted for law-breaking in a way that does not seek to do violence to the individual's conscience, and in such a way that the alleged criminal does not feel that he is under the power of another individual who wishes to harm him, but rather that it is the laws themselves, which otherwise benefit him, that punish him, there is liberty, or the opinion of security.

Montesquieu begins his account of criminal law not by distinguishing between different kinds of crimes and punishments but through the immediate presentation of the

[163] Sullivan, "Montesquieu's Correction," 274–75, 288–89.

most terrifying possibility: that one is condemned to death "without being heard" at all, without even a trial (12.2, ¶3); in the next chapter, he writes of "laws that send a man to death on the deposition of a single witness" (12.3). He begins with the fear, not of death, necessarily, but of false accusation.[164] The contrast of the freedom of the "man against whom proceedings had been brought and who was to be hung the next day" and the slavery of "a pasha in Turkey" also shows this (12.2, ¶5). The former man is free because he has been tried according to known and settled law and was convicted on the basis of solid evidence, whereas the latter man is subject to arbitrary forces even if he does not currently experience violence from them.

It is this fear of false accusations, and of other false forms of inquiry into criminality, that frames the all-important distinctions between different kinds of crimes and their proportional penalties: when the penalty fits the crime, "arbitrariness ends; the penalty does not ensue from the legislator's capriciousness but from the nature of the thing, and man does not do violence to man" (12.4, ¶1). It is the failure to distinguish between these different kinds of crimes that gives rise to the opportunity for men to do violence to men. In the parts of this chapter already examined in a different context, Montesquieu emphasizes the distinction between crimes against security and crimes against religion, i.e., between treason and sacrilege, especially on the question of "hidden actions":

> In the things that disturb the tranquility or security of the state, hidden actions are a concern of human justice. But in those that wound the divinity, where there is no public action, there is no criminal matter; it is all between the man and god who knows the measure and the time of his vengeance. For if the magistrate, confusing things, even searches out hidden sacrilege, he brings an inquisition to a kind of action where it is not necessary; he destroys the liberty of citizens by arming against them the zeal of both timid and brash consciences.

[164] That Montesquieu does not treat the fear of death as man's greatest fear and biggest concern is another aspect of his thought that should be contrasted with Hobbes'.

(12.4, 190)

The question of hidden actions in matters that are not treasonous, that is, not against the security of the state, is related to the question of false accusations. An accusation can be the result of animus, as can the testimony of one person, but the testimony of multiple parties is unlikely to be. It is a question of insulating the individual from the passions of individuals: just as one must be protected from the personal vengeance of one who has been wronged,[165] one must be protected from the passionate indignation of those who feel that "the divinity" has been dishonored. Accusations and investigations into religious crimes incite the passions more than anything else; this is why Montesquieu gives the example of the "Jew, accused of having blasphemed the holy Virgin" and the "[m]asked knights" who are so eager to kill him, and then finishes this paragraph by writing, "I certainly do not want to anticipate the reader's reflections." He imagines, perhaps, that the reader's own passionate indignation has been aroused, but he keeps that passion out of sight, perhaps reflecting in his own writing the effect that liberal institutions should have on the degree to which weakness and passion should affect punishments.

As Montesquieu proceeds in book 12, he increasingly focuses on religious crimes and how the investigations into them and the punishments for them inevitably involve an inquiry into what is hidden which inflames the passions of weak human beings, leading to endless punishments detrimental to the opinion of security. Chapter 5, for instance, is about crimes of "magic" and "heresy." These crimes are not about "actions," but about "the idea one has of [a citizen's] character," and they rest on the "the people's ignorance." They are not

[165] See with 30.20.

productive of liberty because they do not allow for the opinion of security: "a citizen is always in danger," and there is nothing he can do to prove his innocence or put himself above suspicion. Chapter 6 is about "the crime against nature," or homosexuality, a crime that "is often hidden." The passionate indignation aroused against this crime is also liable to being the source of abuses: Montesquieu writes that he does not speak to the crime itself but only to "the tyranny that can take an unfair advantage of even the horror in which it should be held."

That these are crimes against religion is not here explicitly at issue; what is at issue is the degree to which these crimes a) can be known, or the degree to which they are hidden, b) are conflated with crimes of treason, c) involve and encourage the passions of the accuser and the accused, and d) fail to be specific and thus fail to give the accused the knowledge of what he can do to avoid accusation. Thus, in chapter 7 Montesquieu writes, "Vagueness in the crime of high treason is enough to make government degenerate into despotism." Chapter 8 is on "the wrong application of the name of the crime of sacrilege and high treason." Here Montesquieu cites a "law of the emperors," indicating only in a footnote the famously Christian emperors Valentinian and Theodosius (also, Gratian), who "pursued as sacrilegious those who called the prince's judgment into question." He further indicts "two princes whose weakness is famous in history," noting again in a footnote the famously Christian emperors Arcadius and Honorius for a law which "declared that those who made an attempt on the prince's ministers and officers" were "guilty of the crime of treason." He hereby indicates again the connection between weakness and despotism.[166] To drive the

[166] It is also helpful to note here the second paragraph of this chapter, in which Montesquieu mentions a French Judge-Advocate who relied on this law as a precedent for the accusation of treason against Cardinal Richelieu, thus making a subtle connection between the failure of Roman law and the despotism of the

point home in the final paragraph of this chapter, Montesquieu again refers to a "law" of some of his famously Christian whipping-boy emperors, "Valentinian, Theodosius, and Arcadius," which declared "counterfeiters" to be "guilty of the crime of high treason." He remarks, "But does that not confuse ideas about things?" This points forward to book 26, "On the laws in the relation they should have with the order of things upon which they are to enact," a book seemingly misplaced in the part of *Spirit* on religion, but precisely in place at the conclusion of that book if it is to be understood that it is religion that establishes our understanding of the order of things.

Over the course of the rest of book 12, Montesquieu increasingly emphasizes the theme of the hidden and the tendency to conflate the sacrilegious with the treasonous. The short chapter 11 is entitled, "On thoughts," and relates how a tyrant punished a man only for dreaming that he had killed the tyrant. "Laws are charged with punishing only external actions," he writes. Opinion of security depends on being held liable only for what one has done, not for what one has dreamed of doing, believed, or even said or written, for obviously, this man could not have been punished if he had only dreamed this and not shared his dream with others. Thus we move into the question of the conscience, which requires not only that we have and hold onto our beliefs and opinions, but must feel free to represent them to others. The next chapters, accordingly, are "On indiscreet speech" and "On writings." Neither should be considered treasonous in themselves, but only when they are joined together with treasonous acts: "It is not speech that is punished, but an act committed in which speech is used" (12.12). Speech is ambiguous and subject to infinite interpretations. It "does not form a *corpus delicti*: it remains only an idea," and ideas cannot be

French monarchy.

punished without destroying liberty; if speech is a crime, there isn't even the "shadow" of liberty, because one can never be sure that one's speech will not be interpreted to mean something one does not mean (the shadow of liberty would exist where one would be punished for saying specific things).

At the end of this chapter Montesquieu gives an example, from another triad of Christian emperors, which seems to show that they understood that it is bad to punish speech, but actually shows the opposite:

> The emperors Theodosius, Arcadius, and Honorius wrote to Rufinus, the praetorian prefect: "If someone speaks ill of our person or our government, we do not want to punish him; if he has spoken frivolously, he must be scorned; if it is madness, he must be pitied; if it is an insult, he must be pardoned. Thus, looking at the thing as a whole, you will inform us of it so that we may judge speeches by the persons and weigh carefully whether we should subject them to judgment or ignore them." (12.12)

Note that it is not the magistrate who is here given the authority to judge, but the emperors themselves who are to judge, by their own discretion, whether certain speech should be subject to judgment. The crucial phrase is "so that we may judge." This is an example of the conflation of executive and judicial power. Montesquieu had established in the previous book that in order for there to be liberty, these powers must be distinct. Here, he shows that it is especially concern for the regulation of ideas, and concern for the person himself and what he believes and intends, that inclines rulers to conflate these powers to the detriment of the opinion of security, and thus to liberty. While it may not be Christianity specifically, or Christianity alone, that inclines rulers to the conflation of these powers, as it is the despotic government of the Romans that is characteristic of such conflation, it may be that Christianity's concern for belief only exacerbates this ill. It will subsequently be established more

fully that Montesquieu considers the Christian spirit to be detrimental to the spirit of liberty for its desire to look beyond the act to the soul of the actor, but here Montesquieu only suggests this through allusions and subtle indications: the masked knights of chapter 4, mentioning Christian thinkers in the context of writing about what is secret or hidden, and the recurring references to Christian emperors. Conversely, the barbarian spirit in part 3 will come to light as concerned exclusively with the act, prescribing known pecuniary penalties for blatant physical harms, and requiring manifest physical proofs instead of demanding oaths coupled with spiritual proofs.

In the final part of book 12, Montesquieu relates these questions of crime and punishment, especially as they concern what is secret, hidden, or private, to the three different types of regimes (see 2.1): republics (chapters 18–21), monarchies (22–28), and despotisms (29–30). The movement in this part of the book is the same as the movement in the first part. As the regimes in question become more despotic, the regimes are increasingly described as concerned with honor, and thus with perceived slights, and consequently as relying more on interpretation of speech and writing, and ultimately more interested in the soul. Thus, as the chapters proceed, we find the regimes increasingly concerned with religion, and more and more reliant on religion. This movement culminates in a seeming paradox partly borrowed from part 1: despotism, which is not ruled by the letter of written law and is thus without clear separation of crimes against security and crimes against religion, and without clearly prescribed penalties, often takes its very force from religion, but is also for that reason also especially moderated by religion.[167]

[167] See especially 5.14, 61; cf. 25.8, 25.12.

What most interests us here is what Montesquieu says about the political liberty of the citizen in monarchies. In chapter 23, he writes against the practice of the internal use of "spies in a monarchy." A man "must at least have his house as an asylum."[168] The internal use of spies, as much else that is detrimental to liberty, is so terrible to those who suffer from it just as much for the way it gives force to those whose vices and passions are thus activated as it is for the way it invades a person's privacy. Commissioners given free reign by monarchs to judge subjects "believe themselves… justified… even by their fears" (12.22); and a "prince" who employs spies manifests "many anxieties, suspicions, and fears" (12.23). A citizen or subject must not feel that his own security depends on the feeling or comfort of a prince or magistrate whose power is so much greater than his, for if he feels weak and fearful, and the prince also feels weak and fearful, what defense does he have in his own weakness against the prince's weakness and suspicion? Consequently, he must feel fear only of the laws, and not of other people, especially those who have all the power which should be employed for the protection of the citizens. As the origin of political liberty is the strength of the individual, the strength of the political state must be the safeguard of that liberty: "[The prince] is the source of almost all the good that is done, and almost all punishing is the responsibility of the laws" (12.23); "In a certain way, command is easy: the prince must encourage and the laws must menace" (12.25). The executive power of a monarchy is the manifestation of the individual strength of the subjects, and thus must be the source of their feeling of strength, rather than a constant occasion for them to feel their weakness. Montesquieu writes, "The mores of the prince contribute as much to liberty as do

[168] The word translated as "asylum"" is *asile*. This word is elsewhere rendered by Cohler et al. as "sanctuary." See, for example, 29.10 (*OC* 2:871). The most important use of this term is at 25.3, ¶3. It will be discussed in Chapter 4, "Book 25: The Portable Refuge," below.

the laws…. If he loves free souls, he will have subjects; if he loves common souls, he will have slaves. Does he want to know the great art of ruling? Let him bring honor and virtue close to him, let him call forth personal merit" (12.27). In these descriptions of and prescriptions for monarchy, Montesquieu brings the purpose of executive power close to what we will see is characteristic of the barbarians, where the king is one who is recognized for his virtue and strength, and who, in his function as general in war, represents and protects, as well as honors, the individual strength of those who follow him. To the degree to which a king is suspicious rather than secure, and petty rather than magnanimous, he manifests his weakness rather than his strength; to the degree that he feels the need to look into what is hidden rather than ruling according to prescribed laws which establish clear penalties for manifest actions, he rules according to a different spirit than the spirit of liberty.

The final chapters, explicitly "On civil laws appropriate for putting a little liberty in despotic government," afford us the opportunity to restate the argument of book 12 and its connection to what precedes and follows it. It is "mores, manners, and received examples" (12.1), the unstated topics of part 3, that are the real bases of liberty. These, of course, inform good laws about "criminal judgments," which are crucial for the maintenance of liberty (12.2), but without mores, manners, and examples which are informed by a spirit of liberty, these laws will be powerless or never come to be established in the first place. It is pre-legal or extralegal norms which form the ground of the law and inform rule even in cases where there really is no law but the decree of a despot. This can be seen especially in the penultimate chapter. It is ostensibly on "civil laws," though the only examples mentioned are religious laws and customs. The chapter begins, "Though despotic government in its nature is everywhere the same, yet circumstances, a religious opinion, a prejudice, received

examples, a turn of mind, manners, mores, can leave considerable differences among them" (12.29). None of these things are civil laws in the legal sense. The rest of the chapter consists of religious examples which are couched in civil terms: "at the beginning of the empire of the Arabs, the prince was their preacher"; "It is suitable for there to be some sacred book that acts as a rule, like the Koran for the Arabs, the books of Zoroaster for the Persians, the Veda for the Indians, the classics for the Chinese"; "in Turkey, the cadis question the mullahs." Montesquieu speaks of religion as being especially valuable in despotisms: "The religious code replaces the civil code and fixes what is arbitrary." Thus in despotisms, religion acts as the civil code, and promotes stability and civil procedure if not freedom. As his examples are entirely religious, and yet mostly described in civil terms, and Montesquieu does not give examples of the other six types of things that can moderate despotisms, he implies that it is religion that is especially what makes the civil law what it is. He does not mention Christianity, even among his examples of sacred books.[169] He thus perhaps invites the reader to think of the role that Christianity might play in moderating or encouraging despotism, as the case may be (see 11.20). But what he means by religion is, as we can see from this chapter, much more than theology, scripture, and ecclesiastical practice. It is a sacred ground that even a despotic prince must respect, a sort of shape of the soul that shapes the practices of a people. In part 3, Montesquieu introduces the 'religion' of the barbarians, the sacred ground that shapes their souls and practices, and the spirit of their laws, such as they are, and holds them up for comparison to the Roman and Christian religion and mores, and the spirit of their laws. We have already treated book 14 as an out-of-order introduction to book 12. We turn now to the other books of part 3, excepting book

[169] Montesquieu does not refer to the Bible as a whole or any texts of the New Testament in *Spirit*. Cf. 25.8.

19, in what remains of this chapter. Book 19 will be treated in Chapter 4.

Part 3: Barbarian Mores

In an earlier section of this chapter, we discussed book 14, where Montesquieu established that hot climates engender weak hearts with strong passions and timid spirits with atrocious characters, while cold climates engender strong hearts with weak passions and courageous spirits with gentle characters. We gave an account of that book before examining book 12 in detail because it treats the moral causes of civil liberty which give force to the political liberty of the citizen. The next three books of part 3 treat the relation between "the nature of the climate" and "civil," "domestic," and "political servitude," respectively. It is not necessary here to go into those books in detail, or to give an account of the degree to which Montesquieu's account of the power of climate to shape mores represents his actual belief in the overriding importance of physical causes. Nevertheless, it is worth restating an earlier argument from this chapter: if some climates have more power to determine mores than others, then there is no overriding determinism, and moral causes, especially the force of law and education, may trump physical ones. As for why there is such a focus on the effects of climate, and in book 18, on terrain, these questions can be addressed through a consideration of the rhetorical effect of the argument. If it seems that certain parts of the world have almost insurmountable conditions that conduce to servitude, the zeal to transform the institutions of these places according to counsels of perfection may abate. Perhaps more importantly, the force of the argument redounds to the benefit of Europe, the source of liberty, and is thus an encouragement to the promotion and maintenance of liberal mores and institutions in Europe.

The theme of this part, and especially of these books, is servitude, both in the literal sense of slavery in its civil, domestic, and political forms, and in the metaphorical sense of how climate seems inexorably to affect mores. This serves to bring liberty, as a rare and delicate moral phenomenon, to the fore by contrast. In book 15, Montesquieu contrasts, for the first time in *Spirit* in a systematic way, the Romans and the Germans (15.10). Both have slavery, but to put it crudely, the Roman slavery is a bad slavery and the German slavery is a better slavery. The German slavery is simple, tied to the land, and gentle. The Roman version is voluptuous, tied to the person, and cruel. In the context of this argument, he almost completely removes climate from the picture. In the chapter, "Uselessness of slavery among ourselves," Montesquieu writes, "Perhaps there is no climate on earth where one could not engage freemen to work. Because the laws were badly made, lazy men appeared; because these men were lazy, they were enslaved" (15.8). Furthermore, despite occasionally remarking that "in certain countries [slavery] may be founded on a natural reason" (15.7, ¶2), Montesquieu rejects any argument from natural right that would justify slavery (15.2; 15.7, ¶4). Finally, the dichotomy of the Romans and Germans, despite the difference in the climates those peoples inhabited, in no way rests upon climatic arguments. On the contrary, Montesquieu addresses origins and justifications for slavery based on custom, prejudice, religion, and race (15.2–5); he contrasts the slavery of the early Romans, which was more like the gentle slavery he described as belonging to the Germans, with the cruel slavery of luxury of the later Romans (15.16); and he ridicules contemporary arguments for slavery found in "nations among whom civil liberty is generally established" on the grounds that they are a "cry of luxury and voluptuousness" (15.9). Each of these arguments suggests that even though climate is partly the origin of the differences in characters and spirits, it is not entirely

responsible for differences in attitudes toward slavery.[170] Rather, the changes in these institutions prove that mores, manners, and received examples can change regardless of climate.[171]

In the next two books, Montesquieu goes some way toward showing this. Despite the overwhelming emphasis of book 16, "How the laws of domestic slavery are related to the nature of the climate," that cold climates tend to promote monogamy and hot climates polygamy,[172] there are several indications that this is only a tendency and not an absolute determinism. "I do not believe," Montesquieu writes, "that there are many countries where the disproportion [between men and women] is so great that it requires the introduction of a law permitting several wives or one permitting several husbands" (16.4). Elsewhere, however, he admits, "There are climates in which the physical aspect has such strength that morality can do practically nothing" (16.8). But one must be attentive to the reasons for these remarks. Montesquieu openly favors the Christian principle of lifelong, monogamous marriage, but opposes the desire to impose laws according to abstract principles of perfection where that would be to require a despotic law that works against the strong tendency of climate. It would be more correct to say that he opposes "the servitude of women" as a kind of despotism that can be found in both polygamous and monogamous

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[170] Christianity plays a complicated role in this. It teaches human equality, and is thus opposed to slavery (15.7, 252), yet in more than one instance Montesquieu shows how Christianity has made slavery worse for the very goodness of this teaching. "Louis XIII," he writes, "was extremely pained by the law making slaves of the Negroes in his colonies," but gave his approval "when it had been brought fully to his mind that this was the surest way to convert them" (15.4). In the following chapter, Montesquieu gives an ironic defense of Negro slavery, writing, bitterly, "It is impossible for us to assume that these people are men because if we assumed they were men one would begin to believe that we ourselves were not Christian" (15.5). How to explain this seeming paradox? Christianity teaches counsels of perfection, which can lead to a kind of pious cruelty, as opposed to the gentle and ignorant toleration of the barbarians. See Diana Schaub, "Of Believers and Barbarians," in *Early Modern Skepticism and the Origins of Toleration*, Alan Levine, ed. (Lanham: Lexington Books, 1999), 225–47, esp. 241.

[171] See 15.18, "On freeing slaves," for some indication of this.

[172] See especially the last sentence of 16.2, ¶5 with Pangle, *Theological Basis*, 4.

countries (16.9). This becomes clearer at the end of the book where in the last two chapters he distinguishes between "divorce and repudiation," the latter an action which "is done by the will and for the advantage of one of the two parties," and the former one which "occurs by mutual consent on the occasion of a mutual incompatibility" (16.15). Montesquieu examines this distinction in the context of the history of Roman law, but the applicability to Christianity is obvious.

In book 17, returning to the question of political liberty through its contrast in "political servitude," Montesquieu begins to connect mores and liberty more systematically and consequently focuses on the barbarians, his source for the mores that conduce to political liberty. We have seen from book 14 the argument that cold climates make people strong and courageous, while hot climates make people weak and cowardly, and that individual strength and courage is the root of political liberty. Here, Montesquieu makes that connection between climate and courage or cowardice explicit: "[T]he cowardice of the peoples of hot climates has almost always made them slaves and… the courage of the peoples of cold climates has kept them free" (17.2). The great contrast in this short book is between the liberty of Europe and the servitude of Asia. However, Montesquieu's argument is not, as one would expect, simply that because Europe is cold that it is free and because Asia is hot that it is not free. Rather, it is that "Asia has no temperate zone," while the temperate zone of Europe is "very broad" (17.3). Consequently, in Asia the strong and weak constantly face each other and the weak become strong by occupying the hot places, so the peoples of Asia are constantly in a condition of despotic subjugation, whereas in Europe, "strong nations face the strong." "This is the major reason for the weakness of Asia and the strength of Europe, for the liberty of Europe and the servitude of Asia," Montesquieu

writes, adding a remark about the novelty of his observation. It is the temperateness of Europe, and in moral terms, the moderation made necessary by the gentle gradations of its climate, that makes for liberty, whereas it is the meeting of the powerful and the weak, rather than just the prevalence of weakness, that makes for the servitude of Asia. This is important for understanding Montesquieu's teaching on despotism and its opposite, moderation. The former exists where the powerful constantly feel their power over the weak, and yet are constantly in danger of usurpation and so feel a general weakness, while the latter exists where there exists some buffer between governors and governed, and all have enough strength to feel secure.

These observations are followed with a somewhat ahistorical summary of conquest and revolution in these two parts of the world wherein Montesquieu writes that Asia has seen many conquests and revolutions, and Europe only four (17.4). One might justly remark that it is Asia that is typically characterized as always remaining the same, whereas it is Europe that has seen many revolutions. But this is in agreement with Montesquieu's argument, for his point is that Eastern conquerors—even the relatively free Tartars, who are Montesquieu's eastern barbarians, "Asia's natural conquerors"—inevitably become slavish after conquering the slavish Chinese, whereas European conquerors conquer as free men and bring freedom where they conquer (17.5). With this he returns to a favored theme, the salutary barbarian conquest of the Romans: "when the Goths conquered the Roman Empire, they founded monarchy and liberty everywhere" (17.5, 283). He goes further: the barbarians "have been the source of European liberty, that is, of almost all of it that there is today among men," whereas "in all the histories of [Asia] it is not possible to find a single trait marking a free soul" (17.5–6). At the end of the fifth chapter he corrects Jordanes, who

had called "northern Europe the manufactory of the human species" by saying that it is rather "the manufactory of the instruments that break the chains forged in the south," perhaps implying that the principles of liberty found, so to speak, in the forests, may not be only feasible in certain climates, but could be applied elsewhere; these "valiant nations… teach men that, as nature has made them equal, reason can make them dependent only for the sake of their happiness."[173]

What exactly does this teaching of barbarian liberty consist in? In the spread of barbarian mores that are concerned above all with the protection of the individual's liberty and his own pursuit of happiness, simple and flawed though that pursuit may be, rather than the attempt to achieve the glory of the state, or the perfection of the individual through the political promotion of an ennobling civic life. The barbarian success in achieving a model of civil liberty and the flourishing of civil society depends, paradoxically, on the neglect of civil society and the focus on what is purely political: the government which exists primarily in order to protect the rights of the individual, and that civil institution, property, which serves only to insulate the individual from political power. It leaves to the individual his sense of purpose and self-ownership, his identity and property, and limits the political power to the protection, rather than the promotion, of this property. Negative, cultureless, and devoid of content in itself, barbarian politics paradoxically allows for the meaningful employment of individual powers toward individual ends which promote common human flourishing. The barbarians are simple and stupid, and yet provide us, without our looking for it, with a

[173] Cf. however, the last paragraph of 17.6, especially the last clause, where Montesquieu writes that "one will never see [in Asia] anything but the heroism of servitude." This remarkable prediction makes it impossible to argue for the universal applicability of Montesquieu's understanding of the principles of liberty. While those principles have a natural and rational basis, nature does not appear to have provided conditions for their fulfillment everywhere.

system of liberty which need not exist together with simplicity and stupidity. It is toward this model and this system that Montesquieu looks in book 18.

Book 18: The Salic Enclosure

The difference between book 18 and books 14–17 is the difference between climate and terrain. Whereas the climatic books argue that cold climates allow for liberty by producing strong hearts and courageous spirits, the book on terrain shows that less productive lands are productive of liberty by requiring greater hardiness and self-determination among the people who inhabit them. In neither case is Montesquieu's argument deterministic in the modern sociological or historicist sense; rather, it is motivated by a concern for virtue, even a return to the ancient concern for virtue, but in a new situation in which the philosophic legislator is constrained to ask how one might make commerce and liberty compatible.[174] The subject matter of book 18 is distinct not so much for the difference between terrain and climate, but for the change in emphasis from slavery or servitude to liberty. The climatic books are the most deterministic books. In them, Montesquieu is more categorical about the physical causes of spiritual differences. The book on terrain is less deterministic. First, Montesquieu establishes that the laws or religion can counteract the way that natural fertility inclines to servitude (see 18.4–7) or can make a people servile that is otherwise disposed to freedom (18.18). Then he shows that the less one relies on the land for farming and sustenance, the freer one is, the less one is tied to place, and the less one's spirit is subject to

[174] For the ancient understanding of the relation between terrain and virtue, see Plato's *Laws*, 5.747c–e, 4.704a–5b; Thucydides, *Peloponnesian War*, 1.2; and Herodotus, *Histories*, 9.122.3. Machiavelli argues that the terrain or "the site" is not decisive, if the prince or captain knows how to use it: see *Discourses*, 1.1.3 and 3.39, and *The Prince*, ch. 14. For more on this point, see Mansfield, *New Modes and Orders*, 31.

the physical conditions of a place. If Montesquieu is a determinist, his is a paradoxical determinism in which one is subject to the physical causes that allow him to be free from physical causes. There is a parallel here to the characterization of liberty in book 12: "Philosophical liberty consists in the exercise of one's will, or… in one's opinion that one exerts one's will," and "Political liberty consists in security, or at least, in the opinion one has of one's security" (12.2). The laws of climate and terrain are a sort of analogue in the nature of things to the effect of despotism on our own souls.[175] Both heat and oppression make us feel powerless, less inclined to work, more subject to sudden passions. Cold and freedom make us feel more inclined to work, less inclined to sudden passions. Climate thus exercises a kind of power over us, and makes us more or less subject to necessity, more or less inclined to act out of a sense of strength and freedom. Book 18 shows that the law can exercise a similar kind of power, and thus it puts human law into the place of climate, as a force which when heavy-handed is productive of servitude, and when minimal is productive of liberty. Despotism is determinism, determinism is despotism.[176]

Montesquieu makes a strong distinction between those peoples who cultivate the land and those who do not. The former tend to have many civil laws, and consequently less individual freedom, whereas the latter tend to have few civil laws, and more individual freedom. Montesquieu ties civil law to the will: he quotes from Gravina to the effect that the "union" of "wills" is the "civil state" (1.3, 8). One will have the "opinion that one exerts one's will" (12.2) as long as one's property is protected, for it is the civil laws that secure

[175] Schaub, *Erotic Liberalism*, 20, 74, 137.

[176] See 19.4 ("Nature and climate almost alone dominate savages...") with 5.13: "When the savages of Louisiana want fruit, they cut down the tree and gather the fruit. There you have despotic government." For a modern, commercial iteration of that despotic understanding, see 20.20.

property (26.15–16). We established previously that the "*palladium* of property" (26.15) is the way that property exists as protection for the strength of the individual from the strength of the state. At this point we can say that property exists not only to protect the strength, or relative weakness of the individual in comparison with the state, but also to protect the individual's own moral freedom, his sense of moral agency. It turns out that it is the barbarians of northern Europe who most have that sort of freedom, whether from the imposition of the climate or the laws, and consequently their understanding of property is just what Montesquieu has in mind as such a *palladium*.

Book 18, despite its overt focus on terrain, is about this barbarian freedom. The book can be divided roughly into three parts. The first (chapters 1–11) distinguishes between fertile and barren lands and the types of people these lands tend to produce. The force of the relation between lands and peoples is lessened by considerations of how strong legislation can counter the effect of the land (esp., chapters 4–7). The distinction between fertile and barren lands is then resolved into a distinction between cultivated and uncultivated lands where we see that, partly through the effect of legislation, it is paradoxically the less fertile lands that tend to be more cultivated (18.4). The mores and laws of peoples are then seen to relate directly to the mode of subsistence of each people. Montesquieu, in a proto-Marxian classification, distinguishes between four different modes of subsistence, each of which requires a more "extensive code of laws": commercial peoples require the most legislation, then agricultural, then pastoral, and then hunting peoples (18.8). The most important division is between agricultural and non-agricultural peoples, and it will be the mores and laws of the latter that take up the rest of the book. Specifically, it is the pastoral peoples with whom Montesquieu is most concerned: after he distinguishes between

savage peoples, who are hunters, and barbarians, who are pastoral (chapters 9–11, esp. 11), the rest of the book is about the pastoral barbarians, and especially the Salic Franks. The second part of book 18 takes up the relation between the right of nations, the civil law, and the political state of these peoples (chapters 12–22), with a digression on the reason for the lack of freedom among the Tartars, another pastoral people (chapters 19–21). The third part (chapters 23–31) is about the institution of kingship among the Franks, and could be seen as a corollary to the second part.

What characterizes the barbarians is war: they "dispute over uncultivated land, as our citizens dispute over inheritances" (18.12). This distinction is everything, and the root of Montesquieu's admiration. He writes that "they will have so many things to regulate by the right of nations that they will have few to decide by civil right" (18.12; see 1.3, ¶¶4–6). They thus have "very few civil laws" (18.13). However, it is their civil law with which Montesquieu is most concerned; the longest chapter of the book is "On a civil law of the Germanic peoples" (18.22), and concerns barbarian property and inheritance. He writes that "one must discover what property was for these people" and is careful to distinguish the original purpose of that property from later revolutions which gave it novel purposes:

> As the Salic Law did not have as its purpose a preference for one sex over another, it had still less that of perpetuating a family, a name, or a transfer of land; none of this entered the heads of the Germans. It was a purely economic law which gave the house and the land around it to the males who were to live in it and for whom consequently it was best suited. (18.22, 298)

For the barbarians, property is "the land around the house"; Montesquieu emphasizes the fact that "the word Salic comes from the word *sala*, which means house…"

(18.22, 296).[177] He stresses the centrality of the "house" to the mores and laws of barbarian peoples because, in contrast, he has connected the cultivation of the land to hereditary kingship, the need for a multiplication of civil laws, and with that proliferation of legislation, the increased likelihood of laws detrimental to liberty (18.8).

Montesquieu quotes from Tacitus, "[The Germans] cannot tolerate their houses touching one another; each leaves around his house a small parcel of ground a space which is enclosed or shut in" (18.22, 296–97). He omits the reasons that Tacitus proposes: "either as a precaution against the disasters of fire, or because they do not know how to build."[178] Instead, he implies that this "patrimony" is the right of inheritance for the male son who has grown up to be strong, able to wield a spear, and thus capable of participation in the assembly of the people (18.26, 18.28). Property is not a question of "goods" but of "arms" (18.13). It does not tie the citizen to the state but rather insulates him from it. The barbarians have a great individual strength and independence which guarantees their political liberty: "Among these peoples, the liberty of the man is so great that it necessarily brings with it the liberty of the citizen" (18.14).[179] Later, Montesquieu writes that "laws regulate the actions of the citizen, mores regulate the actions of the man," and adds that mores are concerned with "internal," whereas manners are concerned with "external" actions that fall short of the interest of the law (19.16). The barbarian institutions are "*mores* rather than *laws*" (18.13, emphasis original). Thus, their strength and liberty is at the root of their civil law of property,

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[177] See *Spirit*, 297, editors' note c, and Johann Georg von Eckhart, *Leges Francorum Salicae et Ripuariae* (Frankfurt: Foersteri, 1720), 44.

[178] Cf. 297n12 with Tacitus, *Germania*, §16, in *The Complete Works of Tacitu*s, ed. Moses Hadas (New York: Modern Library, 1942), 717.

[179] See this chapter with 19.27, 326, where Montesquieu uses similar language, suggesting that the barbarian's ability to escape the oppression of a king by running to the woods and finding a new leader is like the Englishman's ability to change factions.

and has nothing to do, as Montesquieu will show, with the inheritance in the sense of lands and titles. This is the original sense of the Salic property: the "enclosure" was it. Later, "the Franks acquired new properties" which came to be called "Salic lands," and later still, more "extensive lands" which made it seem harsh that "daughters and their children" could not inherit (18.22, 297).[180] But the inheritance of these lands, and later of fiefdoms, and the extension of the principle of the fiefdom to the notion that the crown itself could be inherited, are entirely independent of the meaning of the Salic enclosure (18.22, 300–301).

Montesquieu delves deep into the meaning of the enclosure because he wants to create, or perhaps revive, the understanding of civil law as the "*palladium* of property" (26.15), that is, the understanding that one's property serves as a shield against violation at the hands of others and the state. He describes the Salic enclosure as just such a *palladium*. The separation implied by the enclosure and the distance from other houses is a stand-in for the feeling of security one has from being strong and capable of defending oneself. It becomes a private right that one has in relation to one's neighbors and to the state itself. Montesquieu is not explicit about this in book 18. He quotes Tacitus only to the effect that they cannot "tolerate" their houses being close; he does not say why.[181] This is for two reasons. First, he has already emphasized how violent barbarians are, constantly fighting over uncultivated land (18.12). More importantly, though, it is because he wishes to use this barbarian understanding of property as a protection for a kind of property the barbarians do not really have, namely, private beliefs and opinions. The matter comes later, but here we are given the form. In the third part of book 18, Montesquieu turns to Frankish kingship. Here

[180] See Shakespeare, *Henry V*, 1.33–95.
[181] The word is *patior*, 'to bear, suffer, or endure.' It is the root of the English "patience."

we see to some degree both the root and consequence of the individual barbarian strength which gave them their civil law. Kings among the Franks are the strong among the strong; they have their authority and hold onto it because of their strength and moderation. A king would come of age when he was able to wield a spear (18.26), and by the passing of a javelin from an uncle to a nephew, a king is made by "adoption" (18.28).[182] A king served only as leader in war, and "in each village the princes rendered justice among their own" (18.30). This passage ties together the earlier description of the political liberty of the citizen, best effected by the separation of the judicial power, and the later description of barbarian judicial settlements (30.19).

Montesquieu gives here the modern natural rights teaching in its historical infancy. At first it was as if each man with his own house and flock was a separate ruler, holding sway as long as he merited it. But even when a long habit of authority through recognition of merit gave rise to a truly political ruler over many subjects, each man retained the shadow of that political right, the notion that he is a self-ruler, in his civil right. It is only a few steps from this to the most complete refinement of this thinking into the principle that all men simply by virtue of being human have the right to life, liberty, and property. But one should note here the exceptions and distinctions, because they show us how Montesquieu distinguishes the barbarian spirit from foreign spirits.[183] Among the barbarians in general the strength of the man, which is the root of political liberty, is what makes him free as a citizen (18.14). Among the Visigoths, by contrast, "the provisions of the civil law forced the political law"

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[182] Later we see that the executive or "royal" power was initially exercised by a "mayor" of the palace and not the king (31.1, 670–71; 31.3–7). That this usage predated the institution of the mayoralty is seen at 18.30 and n59.

[183] 18.22, 300: "The laws of these barbarian peoples, who all come from Germany, interpret each other; the more so because they all have nearly the same spirit."

(18.22, 301).[184] The Visigoths and certain other barbarian peoples are associated with Roman law under the influence of Christianity (e.g., 26.19, 28.1, and 28.3). Their laws were remade after the conquest of Roman lands. As such, they tended to confuse principles of natural right or natural law with principles of political or civil right or law (see 26.6). What Hobbes and Locke call natural right is more like the case of the Salic law where the political necessity informs the civil and natural than the case of the Visigothic or Christian law where the natural is seen to inform the civil and the political.[185] What was called natural right according to the spirit of Christianity is more like what Montesquieu calls canonical right (26.8; 28.42, 597); what will be called natural right according to the spirit of liberalism has been more like the civil law of the Germans: the customs, tied to a place, concerning the sacred (26.8, 501; 26.10).[186]

30.19–20: The Fredum & the Justice of the Lords

In part 6, Montesquieu returns to the Salic law in order to contrast its barbarian spirit even

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[184] Montesquieu does admit that the crown was inherited under Salic law and there were other cases "among the Franks where the political law gave way to the civil law" (18.22, 301). But the subsequent chapters demonstrate that executive power was actually exercised by those who merited it and that their rule was signified by signs of strength of power such as "long hair"—the real "diadem" (18.23)—or the passing down of a "javelin" (18.28).

[185] Montesquieu gives examples of this new understanding of natural law or right in 26.6, 499 and 26.7.

[186] Cf. Lowenthal, "Montesquieu," 527, 533. One should also contrast the relation between priests and the executive power "among barbarian peoples" and that which later developed "in the beginning of the reign of the Merovingians" (18.31), that is, with the conquest of Roman lands and the influence of Christianity. It is when they merely reinforced the notion of the holy, or "superstition," that they always remained separate from political and civil power, whereas the bishops gain political influence when their judgment must be consulted concerning a natural law that is at odds with "superstition" (see 28.41–43). At 18.18, Montesquieu gives an example of the kind of superstition that would perhaps be consistent with this innovation. It is based on a combined political and religious leader requiring endless gifts. See 25.7–8—the central chapters of Part 5, on religion—for how a new superstition along these lines can entwine the political and religious powers in Europe and how one needs an independent record of the sacred in order to prevent this. See also 28.10, where Montesquieu decries the ecclesiastical practice of "adding capitularies to the personal laws," which he equates with civil law. Personal laws are the customs of particular peoples (28.12).

more explicitly with the spirit of Roman law. The Roman spirit, both in its pre-Christian and Christian forms, informed the institution of fiefdoms and the Roman-French understanding of rights as granted by the throne rather than as belonging to the individual. The considerations in part 3 are more general and philosophical, whereas in part 6, they are historical. Part 6 would seem to be a case study of what was seen in theory in part 3. However, in book 30 we find something that is helpful for understanding Montesquieu's teachings on separation of powers, criminal law, and the Salic law as a model for civil law. This is the *fredum*, or the payment for protection of the criminal from vengeance, paid to the local lord who oversees the administration of justice. This institution shows that there is a common spirit behind the Salic enclosure in civil law and the separation of powers in political law. Furthermore, it is a helpful link between Montesquieu's use of the barbarians and his prescriptions in parts 4 and 5 for commerce and religion.

In book 18, Montesquieu was careful to distinguish the Salic, or allodial lands, from the fiefs which were originally "not hereditary" (18.22, 300). Allods were the lands owned by free men as an inheritance and as a consequence of political law (see 30.16–17), whereas fiefs were revocable titles of honor which carried with them the responsibility of regulating civil right and the privilege of collecting judicial penalties. Later, even when "fiefs had become hereditary" (28.9) and the barbarian laws had been forgotten, Montesquieu tells us that "settlements and what were called *freda* were more regulated by custom"; when the law was lost, "written laws returned to unwritten usages" (28.11, 546). These usages or customs governed the particular people who lived by them as "personal laws" when in the context of a larger, territorial power. This is what Montesquieu means by "civil law" in the historical context (28.10). The Salic law was a personal law but also, at times, a territorial law with

different personal laws under it in accordance with the different customs of its subject peoples (28.12, 547). From this arises the confusion about whether the Salic law's provision for allodial lands carries with it the judicial power or the right exercised by local fiefdoms, and ultimately, the argument that fiefdoms and the judicial power could be inherited in the same way as allodial lands. Against this argument, and pointing to the primacy of the barbarian spirit, Montesquieu says, "France was regulated by unwritten customs… and the particular usages of each lordship formed the civil right" (28.45).[187]

The civil right is the right of judgment which preserves the opinion of security, or the liberty, of every citizen even when he has committed a crime (30.20, 651). Montesquieu does not want this right to depend upon political right because it is political right which makes that liberty possible by determining what one's property and goods are from the foundation of the political order, implying the use of force, either on the part of the ruler or the citizen himself, to defend it (18.22, 297). If the political power is able to deprive a citizen of property in consequence of a civil fault, one not disruptive of the public power, then it deprives him of that opinion of security which constitutes the liberty which is the basis of the law, rooted in the customs of this particular people (see 18.14). The custom which guaranteed this liberty among the Franks and Germans was the settlement by payment of reparations to the injured party when one had wronged him or his relative (30.19). The civil right which guarantees this settlement is the *fredum*, "compensation" to one's lord "for protection granted from the right of vengeance" (30.20). One's guilt was not judged by the lord; rather, one paid the established pecuniary penalty for the injustice committed, and then

[187] Wormald, in "The *Leges Barbarorum*," 21–22, gives an account that would call into question Montesquieu's argument, and cast doubt on the degree to which the Germanic peoples maintained these legal customs independently of Roman legal influence. See also Pangle, *Montesquieu's Philosophy of Liberalism*, 282.

paid the *fredum* to the lord for the protection of this settlement: "The justice was nothing other than the right to see that settlements in accord with the law were paid and to exact fines in accord with the law" (30.20, 652). The public good consists in security of one's life and liberty, putting an end to private vengeances (see 26.15). This can be contrasted with the idea that the divinity must be avenged on behalf of the public by searching out a "hidden sacrilege" (12.4). There, no one has the opinion of security because the fault cannot be seen, known, or measured, and so one can never be granted protection from vengeance.

About the barbarian law codes, which mostly consist of lists of physical crimes and their pecuniary penalties, in the context of his discussion of judicial settlements, Montesquieu writes, "By establishing these laws, the German peoples came out of that state of nature in which it seems they still were at the time of Tacitus" (30.19, 647–48). Montesquieu does not point to the natural condition of war among the barbarians, "in which, without the restraint of any political or civil law, [each family] could exact its vengeance according to its fancy until it was satisfied" (647), as his standard, but rather the barbarian spirit which does not give free rein to the imagination more than to consider what each would want in order to establish peace:

> All these barbarian laws have an admirable precision on the subject: cases are carefully distinguished, circumstances are weighed; the law puts itself in the place of the offended man and asks for him the satisfaction that, in a cool moment, he himself would have demanded. (20.19, 647)

Montesquieu's emphasis on the *fredum*, which, as has been said, is merely a fee paid to the local lord to guarantee this judicial settlement, and prevent the execution of vengeance—in a way, *not* to see justice, in the higher sense, done—thus provides a link between his use of the barbarian spirit as a model for criminal law and the purpose of his books on religion and

commerce. In those books, he promotes religious freedom and promotes commerce as an indirect vehicle of that freedom. Just as the barbarian's enclosure and institutions like the *fredum* protect him from violence—even intrusions into his privacy on religious grounds, in the case of protection from vengeance, where an aggrieved party might feel a sacred duty to avenge his kin—modern commerce will allow the individual a sort of protection against despotic intrusions on his conscience in the name of enforcing orthodoxy and the public defense of virtue. This is a complicated connection because barbarians do not have serious religious beliefs; they do not have many opinions that need protection or that anyone would be interested in changing through force.[188] Yet Montesquieu translates this barbarian spirit into a modern context in which religious beliefs are complex and controversial. This is a movement from disputes over life to disputes over belief, from bodily fear to the fright of the conscience. This movement parallels the shift in focus from political law to civil law. Though the Salic law cannot be said to be purely political (18.22, title; 28.12, 547), it was originally mostly a political and not a civil arrangement. Montesquieu says it "concerns the institutions of a people who did not cultivate the land" (18.22, 296), but people who do not sow do not have money (18.17), and among those without money "there are scarcely any arrangements that are not political" (18.16): crimes mostly involve the use of violence against the persons and property contained within Salic enclosures. Later, however, there must be a civil law that extends beyond those enclosures to all of the types of property one may have when one is no longer a barbarian. The opinion of security inherent in barbarian liberty must be made compatible with commerce and with particular religious beliefs. It is to this transformation that we turn in the final chapter.

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188 Schaub, "Believers and Barbarians," 226.

CHAPTER 4: CONSCIENCE AS PROPERTY

Introduction: From Part 3 to Parts 4 & 5

Book 19 is a kind of ending: it completes what was, in the first two editions of *Spirit*, the first volume.[189] As such, it has a summarizing function, bringing together the considerations about mores and manners that occupied much of part 3 with the material of parts 1 and 2. Montesquieu writes here, for the first time, of the "general spirit" of a nation, and promises that he will be "more attentive to the order of things than to things themselves" (cf. 8.6, ¶3), recalling his promise from the first book that he would follow the "spirit of the laws" rather than the laws themselves, and the "relations" between things rather than "the natural order of the laws" (book 19, title; 1.3, 9). It is thus reasonable to connect or even equate these three: the spirit of the laws, the general spirit of a people or a nation, and the order of things.[190] It is clear in the context of the titular statement in book 1 that by "spirit of the laws" Montesquieu refers to separate spirits for "each nation" (1.3, 8), or what he here first calls the "general spirit."[191] However, Montesquieu begins to use that formulation here at the end of the first volume because only after part 3 has he established the way that a people or a nation becomes what it is. This way is the "order of things," a confusing and even rarer formulation, but one which generally indicates the priority of mores to laws and what kinds of laws are possible or necessary in each regime.[192] Unlike the general spirit, the order of things refers to a universal truth, rather than particular ones, but it is a prudential truth that

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189 Warner, "By Land and By Sea."

190 Cf. Schaub, "Montesquieu's Legislator," 155–56; Samuel, 316.

191 "General spirit" (*l'esprit général*) is used only three times outside of book 19, all of them in books of the second volume. It is found at 19, title; 19.4, 19.5, 19.11, 19.12, 19.19, 23.27, 28.15, and 31.13.

192 "Order of things" (*l'ordre des choses*) occurs in this precise formulation only at 8.6, 12.22, 19.1, and the title of book 26, although it is indicated in various periphrastic ways, most notably at 1.3, 9.

concerns the particulars of each nation. One can see this by attending to the differences between books 19 and 26: the first refers in its title to the general spirit of each nation, and then to the order of things in its first chapter; the second refers to the order of things in its title, and relates universal principles to particular circumstances in its first chapter.[193] Montesquieu's overt emphasis is on the particular—he writes, for instance, that it is nearly impossible for Christianity to be established in China (19.18)—yet his perhaps covert but consistent focus is on the universal, and a new understanding of the order of things that is attentive to the general spirit of each nation in a way that the old understanding of the order of things—Christianity—was not. Books 19 and 26 are reflections of each other: while 26 is the final book in the part on religion, and connects divine and ecclesiastical law to human law and its implicit bases in mores and manners, 19 is the final book in the part on mores and manners and connects these to law, including, implicitly, to the way that religion informs the understanding of the law.

Montesquieu has come in book 19 to his understanding of the order of things in part 3 through his focus on barbarian mores, and the connection between those mores and different kinds of law. This order of things will then be applied, in the second volume, to the modern context, to the modern problem. That problem is the problem of opinion and belief, specifically how important they are in the modern context because of Christianity and the Enlightenment.[194] Christianity and the Enlightenment themselves are not the problem.

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[193] Schaub, "Montesquieu's Legislator," 154–56, connects these two books, and thereby the general spirit and the order of things, in a similar way, through a comparison of the titles of the first chapter of each, 19.1, "The subject of this book," and 26.1, "The idea of this book": the idea in book 26 is to legislate in accordance with the general spirit of each nation, and the subject alluded to in book 19 is how the general spirit of each nation shows the legislator the nature of things.

[194] As Hobbes notes in *De Cive*, Scholasticism has made commonplace the distinction between opinion and knowledge. See *Man and Citizen*, Preface, 96–97; and *Leviathan*, Ch. 46, esp. 46.14 and 46.37. On Hobbes' own response to this situation, see Leo Strauss, "On the Basis of Hobbes's Political Philosophy," in *What is Political*

Rather, they are both problematic because of the way their concern with the truth of opinion and belief mix with the strength and independence of the barbarian spirit and the comprehensive concern for virtue of the Roman legal spirit. Opinion can be tyrannical in the modern context in a way that it could not in the premodern, including the barbarian, context.[195] In Montesquieu's language, this modern concern for orthodoxy is *despotic*: it creates fear, and is enforced through fear. The barbarian mores are a model because they are strong, not susceptible to the atrociousness that results from weakness. Yet they are predicated on human weakness in a way that the mores of other peoples are not. Because we are weak and fearful, we need protections. Government must protect the individual and his sense of his own strength; it must not put him in a position where he feels his own weakness. These barbarian mores are especially helpful for the modern situation in which belief is so important because belief is not an exterior act, but a hidden, inner conviction which is difficult to measure or to prove, and the individual can know only that he falls short of the standard of perfection that the distinction between opinion and knowledge entails. For the barbarians, all crimes are material and measurable, easily discernible and expiable. The barbarian's property is already metaphysical, already spiritual, but it is empty of content. In Montesquieu's hands, that property is made ready for content. It becomes the *conscience*, that spiritual sense of security which is insulated for the individual from despotic intrusion. Real, tangible property is what insulates him, through commerce. Here, the barbarian's placelessness, his toleration, and his malleability, are also models. The barbarian is not tied down to a doctrine, a place, even a fixed order of goods. Similarly, the citizen of the

Philosophy? (Chicago: University of Chicago Press, 1959), 180; and Robert Kraynak, "Hobbes on Barbarism and Civilization" *Journal of Politics* 45, no. 1 (1983): 95.

[195] See *Pensées*, 917.

commercial republic is free to use his own property for his own benefit without fear that it will be confiscated in the name of enforcement of orthodoxy.

This is Montesquieu's project, carried out in parts 4 and 5 on commerce and religion. However, in those parts of *Spirit* the figure of the barbarian and his mores slips into the background, barely discernible. Yet his teachings on commerce and religion are adaptations and transformations of the barbarian model that he has already solidified by the end of part 3, and throughout the second volume of *Spirit* it is that model which informs his presentation of the relation of the laws to commerce and religion. He indicates this in the conclusive book 19. We turn in this last chapter to an analysis along these lines of that book, before turning briefly to see the consequences of that argument for parts 4 and 5.

Book 19: The General Spirit of Europe

Book 19 is a book about change and lack of change. After the introductory first chapter, where Montesquieu writes, "I must push things away, break through, and bring my subject to light" (cf. 20.1, ¶1), he spends the next chapters cautioning against introducing changes that contradict the general spirit of a nation (chapters 2–6). However, it is not as simple as this, for there are qualities, both virtues and vices, which make change in a nation possible and desirable (chapters 7–15). There are also qualities which make change nearly impossible and therefore undesirable. In this middle section of the book, the Chinese counter-example to Europe is prominent (chapters 10, 13, 16–20). Generally, Montesquieu's argument is that laws follow, and are derivative from, mores (chapters 16–26). Here, the revolutions in Roman mores are demonstrated through a clever series of "Continuation of the same subject" chapters (23–26). Finally, there is a long chapter (27) on the English mores,

introduced as an example of "how mores follow laws" (19.26, ¶2). This last chapter is a seeming counter-example in that Montesquieu reverses the order of mores and laws, but it really is not, because Montesquieu has already established that the English laws are based on barbarian mores. More importantly, however, what this chapter indicates is how laws can support a change in mores when such a change is necessary for some reason, like a change in religion. The last chapter, which while being about contemporary England is also written in the subjunctive mood, contains Montesquieu's prescription for Europe in general.[196] It contains, in miniature, a depiction of barbarian mores translated to the modern commercial and religious context.

The book begins, however, with strong implicit argument against change. The Germans get the first word: they do not like the Roman judicial procedure. Similarly, other barbarian peoples, the Laxians and the Parthians, find distasteful both the formality of Roman and Byzantine judicial procedure and the affability of their kings (19.2). Montesquieu writes, ironically, "Even liberty has appeared intolerable to peoples who were not accustomed to enjoying it. Thus is pure air sometimes harmful to those who have lived in

[196] See the very end of book 19 (333), which is the end of volume 1, with the end of the Preface (¶16) and the end of volume 2 (31.34, 722: "*Italiam, Italiam*…"). Montesquieu in these three places indicates both the "Italian" and the English origins of his project. He says at the end of the Preface, "I too am a painter," citing, in Italian, the apocryphal remark of Coreggio upon seeing Raphael's *St. Cecilia* (xlv, note 3, editors' note). At the end of volume 1, he writes, "One would find there something closer to Michelangelo's strength than to Raphael's grace." Caillois notes that this is an "allusion à Milton," and it likely is, but it is also a callback to the Preface, where Montesquieu identified himself with Coreggio comparing himself to Raphael. There, the painter was a metaphor for a writer. The most notable Italian writer, one of the "great men" who had "written before" Montesquieu on politics, was Machiavelli, who is called a "great man" at 6.5. This series of allusions together indicate something that the book as a whole shows: Montesquieu's project is to give a new self-knowledge (see Preface, ¶13) to European peoples by showing them their barbarian origins and the reasons for their institutions. The culmination of book 19 shows England as the fulfillment of the Machiavellian intention, or at least Montesquieu's use of England as a model for his own painting that is to be compared to Machiavelli's. Cf. the foregoing with *Pensées*, 1124: "Authors are always using each other. They have three manners, like painters: that of their master, which is that of the secondary school; that of their talent, which makes them produce good works; and that of art, which among painters is called manner."

swampy countries." These examples are problematic after a book which spent many chapters praising the mores of the Germanic barbarians above all for their conduciveness to political liberty. The formal procedures alluded to perhaps give a greater civil liberty to the Romans, but that kind of liberty is barely relevant in the barbarian context.[197] Elsewhere, we saw that it is characteristic of despotic government to consist entirely in administration, in civil government without a constitution that guarantees rights (5.14, 60). In the next chapter, "On tyranny," Montesquieu distinguishes between tyranny which "consists in the violence of the government," and "one of opinion, which is felt when those who govern establish things that run counter to a nation's way of thinking" (19.3).[198] Again, Montesquieu gives misleading examples, but nevertheless establishes this important point, that laws which come from a foreign spirit, even if better than the native ones, are felt as tyrannical. It is at this point that Montesquieu gives us a chapter on "what the general spirit is" (19.4), because it is when laws go against the general spirit that they are felt as tyrannical. This chapter is important for what it does not say, indicating through an intentional lacuna the real subject of book 19 and of the rest of *Spirit*. Montesquieu writes, "Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners; a general spirit is formed as a result." Of these seven governing factors, in the examples of

[197] In another of Montesquieu's misleading examples, we laugh at the king of Pegu, who himself laughed uncontrollably when he learned "that there was no king in Venice" (19.2, ¶2). However, in the part of *Spirit* on religion, Pegu is a model of the religious toleration that Montesquieu admires (24.8). Reading these passages together, we wonder if there might be a connection between revealed religion (one "given by god"), lack of religious toleration, and "popular government," and, conversely, lack of revealed religion, a civil religion focused on moral actions rather than belief, and the barbarian form of kingship which promotes, rather than hinders, political liberty.

[198] "Way [or manner] of thinking" (*manière de penser*) is an important phrase for Montesquieu that becomes increasingly important as religion, the effects of religion, and distinctions between the barbarian and Christian spirits become explicit themes of the text. Besides here, it is used at 3.10, 12.28, 14.12, 19.24, 19.27, 23.1, 24.1, 25.2, 28.17, 28.27, 29.16, and 30.6.

the next paragraph Montesquieu does not mention only "religion" and "examples of past things." These are the two that he will attend to and rely upon the most, and the two that most govern, or will govern, Europe: Christianity and the example of the barbarians.[199] Given the context of the preceding chapters, Montesquieu here seems to point to what is problematic about the introduction of the Christian spirit into European law. It is a "pure air" that barbarian peoples are not used to breathing.

Accordingly, the next chapter is titled, "How careful one must be not to change the general spirit of a nation" (19.5). However, Christianity was introduced into Europe long ago. If the general spirit is defined by what governs the people, one could fairly say that it is Christianity that already governs Europe, and barbarism is long forgotten. The caution recommended by this chapter's title could then apply to the mixing of the barbarian, Roman, and Christian spirits in Christian Europe. Alternatively, it could refer to Montesquieu's own project of trying to make "examples of past things," rather than religion, govern European peoples. That is, it could look backward to the Christian attempt to change the general spirit, or it could look forward to Montesquieu's attempt. The next several chapters barely resolve this tension, as they seem to promote both change and conservatism.[200] Montesquieu refers,

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[199] It is possible but unlikely, given the way the parts of the book are presented at 1.3, 9 to bring liberty and religion to the center, that the ordering of governing factors in this chapter is unintentional. Here, the central item is "the maxims of the government," while, if "laws" refers to the "principles" of part 1, "mores" to the liberty of part 2, and "manners" to the commerce of part 4 (see 19.12, ¶4 for proof of this), the other six factors correspond to the parts of *Spirit*. Maxims seem to be the most ineffectual governing factor, as at 19.12, "In manners and mores in the despotic state" (incidentally, the central of *Spirit*'s 605 chapters), Montesquieu writes, "It is a maxim of capital importance that the mores and manners of a despotic state must never be changed…" but then goes on to say that everything in these states is governed by mores and manners, not maxims. Montesquieu also modifies what he says at the end of 19.4 about Rome being governed "by the maxims of government and the ancient mores" when he writes in a footnote, "The first Romans mixed together the old customs and the laws" (19.16, n16). "Maxims" thus seems redundant, and if removed from the list, would yield a new list of six parts where religion and liberty return to the second and fifth positions they occupy in the actual book, but in reverse order, whereas climate and commerce, in the center of the book, move to the outside.

[200] On this tension, see also Preface, ¶¶9–10 with ¶¶11–13 and Warner, "Montesquieu's Address."

hypothetically, to a nation with "a sociable humor, an openness of heart, [wherein] one should avoid disturbing its manners by laws, in order not to disturb its virtues" (19.5). In the next chapter he writes, "May we be left as we are," quoting without reference "a gentleman of a nation closely resembling the one of which we have just given an idea" (19.6). This second statement indicates that the first nation is probably France, while the second is likely England. In both cases, the question is whether a "legislator" should attempt to cure a nation of its "sociable humor" when that humor leads to some vices but is mostly harmless. This would suggest that the question is of the degree to which Christianity should attempt through law to cure these nations of their vices. But in another chapter, titled "Some effects of the sociable humor," Montesquieu suggests that such nations "easily change their manners" because of their openness, and that their vanity establishes "fashions" and thus "increases the branches of commerce" (19.8).[201] Here, rather than conservatism, Montesquieu promotes the change effected by commerce. He shows himself to be a conservative with respect to laws and a liberal with respect to mores and manners. In subsequent chapters, he describes further the good qualities that nations with bad characters can have (19.10), and distinguishes between "political vices and moral vices," writing that "those who make laws that run counter to the general spirit should not be ignorant" of how moral vices can act as political virtues (19.11).

The question of whether Montesquieu is describing the Christian change of mores and manners, his own project to change these, or both, remains ambiguous. But in the middle chapters of this book he makes the terms clearer: "Laws are established, mores are inspired;

[201] Here Montesquieu cites Mandeville's *The Fable of the Bees*, which is subtitled, *Private Vices, Public Benefits* (Montesquieu does not provide the subtitle).

the latter depend more on the general spirit, the former depend more on a particular institution; now, it is as dangerous, if not more so, to overturn the general spirit as to change a particular institution" (19.12, ¶2). By "particular institution," Montesquieu refers to "the precise institutions of the legislator," whereas by the "general spirit," he refers to "the institutions of the nation in general" (19.14). As laws depend on mores, they cannot change mores; "when one wants to change the mores and manners, one must not change them by the laws, as this would appear too tyrannical; it would be better to change them by other mores and other manners" (19.12). The inability to change mores and manners is characteristic of despotic government, where "each man… exercises and suffers an arbitrary power" and the people are "less communicative" (19.12). However, in sociable, communicative nations, "manners change every day"; "manners" now describes commerce, made possible through common vanity. As opposed to China, where "manners are indestructible" and women are "completely separated from the men" (19.13), in Europe, women and men "spoil each other," and manners are fluid (19.12). If one wishes to change manners, he should not use penalties prescribed by law, but "examples" (19.14). Montesquieu uses Peter the Great as an example: his laws "obliging the Muscovites to shorten their beards and their clothing" were felt as tyrannical, but his giving of "German" clothing to the influential women was rapidly effective (19.14). Here it becomes clear that the question is not just of introducing any old mores and manners, but rather of *reintroducing* them where they have been obscured: "What made the change easier was that the mores of that time were foreign to the climate and had been carried there by the mixture of nations and by conquests. Peter found it easier than he had expected to give the mores and manners of Europe to a European nation" (19.14, 316). Montesquieu gives away the game: he himself

wishes to "engage the peoples to change [their customs] themselves" through his own reintroduction of "the mores and manners of Europe" that had been obscured by Christianity.

What is it, then, that he wishes to change? The distinction between what laws should do and what mores and manners should do is paramount. At the end of this chapter he writes, "The law is not a pure act of power; things indifferent by their nature are not within its scope (*ressort*)" (19.14, 316). Two words are crucial in this sentence: "indifferent" and "scope." That that of which Peter aimed to reduce the influence in Russia was religious law is clear enough from his examples, but the subsequent uses of the word "indifferent" in this book make it clearer still that Montesquieu uses Peter as a proxy for his own attempt to change the mores of Europe through the inspiration, or reintroduction, of the barbarian example when it comes to religion. The Chinese are, again, his counterexample. In a chapter entitled, "How this union of religion, laws, mores, and manners was made among the Chinese," he shows how "things that are seemingly indifferent" to "China's fundamental constitution," such as "whether a daughter-in-law gets up every morning to perform such-and-such duties for a mother-in-law" and "ceremonies for dead fathers," both of which he ties to the religion, needed to be maintained exactly in order to maintain the state: "these external practices constantly call one back to a feeling, which it is necessary to impress on all hearts, and which comes from all hearts to form the spirit that governs the empire…" (19.19). In the chapter on England, by contrast, he writes, "With regard to religion, as in this state each citizen would have his own will and would consequently be led by his own enlightenment or his fantasies, what would happen is that everyone would be very indifferent to all sorts of religion of whatever kind… or that one would be zealous for

religion in general" (19.27, 330; see 25.12). Whereas in China, the religious customs are tied inextricably to the law, and the law must make definite pronouncements on matters of religious ceremony, the mores of European nations are such that indifference to the content of religion is at least possible, and what is of utmost importance is rather *property in religion*:

> It would not be impossible for there to be in this nation people who had no religion and who would not for all that want to be obliged to change the one they would have had if they had had one, for they would immediately feel that life and goods are no more theirs than their way of thinking and that he who can rob them of the one can more easily take away the other. (19.27, 330)

This remarkable statement, anticipating the jealous protection of religious liberty even in the absence of strong religious opinion, can only be understood in light of Montesquieu's teaching on the relation between property and liberty in part 2, and his teaching on the relation between the mores conducive to liberty and the law, in part 3. Montesquieu in effect reverses the order of understanding, from religion being what makes liberty good, to liberty being what makes religion good; what becomes most important about religion is that it is connected to "the idea of liberty" (19.27, 330). Religion as part of the general spirit of modernity is in essence only the jealous protection of property: that property which acts as the *palladium* between the individual who is led by his own will, enlightenment, or fantasies, and the state which rather than promoting his good through the public maintenance of religion, only defends his right to be religious, whatever that may mean to him.

When Montesquieu says that "things indifferent by their nature are not within [the] scope [of the law]" (19.14, 316), then, he is talking about more than just religious customs which an overzealous ruler may attempt to prescribe or proscribe. He means that even ensuring that the people are religious is outside of the law's bounds. The word translated as

"scope" is *ressort*, usually translated as "spring."[202] This word is used both for what makes a regime work, what it is ordered around—its principle—as virtue in a republic, honor in a monarchy, and fear in a despotic state; and for what the law is able to punish and what it can use to punish it. He made a similar statement in his chapter distinguishing "four sorts of crimes," especially separating crimes against religion from crimes against tranquility or security: "In the things that disturb the tranquility or security of the state, hidden actions are a concern (*ressort*) of human justice. But in those that wound the divinity, where there is no public action, there is no criminal matter; it is all between the man and God who knows the measure and time of his vengeance" (12.4). What is indifferent from the point of view of the law, and outside its scope, is not just customs in dress and the particulars of ceremonies, but blasphemy and sacrilege. The punishment for sacrilege should be "deprivation of all the advantages given by religion"; the law certainly should not take upon itself the task of avenging the divinity (12.4). Montesquieu claims that he draws this distinction between the types of crimes and their appropriate punishments "from nature" and that it "is quite favorable to the citizen's liberty" (12.4, end). But the distinctions are only able to be maintained through the use of property. The thread of this argument culminates in book 26, where Montesquieu distinguishes between nine types of law and compares the scope of each (26.1), focusing especially upon the distinction between divine laws and other types of laws. This book itself culminates in property as that *palladium* between the man and the state that allows these distinctions to be maintained (26.15–16), and then in the distinction between mere commercial regulations and civil laws (26.24).

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[202] See *Spirit*, 316, editors' note c, and 190, note a. For "spring," see Author's foreword, xli, and especially books 3, 5, 6, and 24.14, ¶8, 26.9, and 26.13.

The scope of the law, then, is external actions that violate security and tranquility, rather than the internal motivations of religion. But as property is an external reality that represents and protects one's internal feeling of security, it itself must not be under the scope of the criminal law in ordinary cases, but only the regulations of "every day," or what Montesquieu calls "the police" (26.24). Property reflects the distinction between the internal and the external in that it is, internally, one's own sense of oneself—one's conscience—and externally, it is something like one's identity, or what we might call 'expression,' how one chooses to represent oneself to others.[203] The argument that hidden actions in matters of religion are outside the scope of the law is the argument for the privacy of conscience, but that argument is itself not tenable unless the external reflections of that conscience are themselves also protected. Montesquieu makes this argument in an extreme form: "Because, in order to enjoy liberty, each must be able to say what he thinks and because, in order to preserve it, each must still be able to say what he thinks, a citizen in this state would say and write everything that the laws had not expressly prohibited him from saying or writing" (19.27, 327). The citizen's liberty is shown not only in his *ability* to say what the law does not expressly prohibit, but in his actually saying or writing those things. The citizen thus shows externally his internal liberty. This extreme argument is a consequence of the framing of the

[203] See Rebecca E. Kingston, "Introduction," in *Montesquieu and His Legacy*, Rebecca E. Kingston, ed. (Albany: State University of New York Press, 2009), 1–6, esp. 4. Cf. Brian C. J. Singer, "Montesquieu on Power: Beyond Checks and Balances," in Kingston, ed., *Montesquieu and His Legacy*, 108. In addition, contrast my argument about property as the medium between an inner and an outer self with Singer's presentation of the formation of identity in *Discovery of the Social*, 14–19: Singer's argument, based on Montesquieu's application of Malebranche's theory of representation in book 1 of *Spirit*, is that identity is formed through the representation of power. See also Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), 196. Taylor contrasts what he calls the "atomist" view of individual liberty with "the notion of citizen virtue," which he associates with Montesquieu. This virtue, he writes, is "prior to individuals," and "establishes their identity." This is a misreading of Montesquieu which conflates ancient and modern republicanism, and is not what I mean here by "identity." See *Spirit*, Author's foreword, 3.3, and esp., 4.4.

chapter on English "customs" as "the effects that had to follow, the character that was formed," and "the manners that had to result" from the English constitution" (19.27, 325).

With the English, we see the passions constantly manifesting themselves, even the darkest passions: "hatred, envy, jealousy, and the ardor for enriching and distinguishing oneself" (19.27, 325). Yet the constant "stretching of all the springs" serves to make the citizens "attentive" and jealously protective of their liberty (19.27, 326–27). In order to understand this description of the English we need to see how Montesquieu understands the relation between the laws, mores, and manners. In chapter 16, Montesquieu implicitly distinguishes between the laws of Moses, the Romans, the Spartans, the Chinese; and those of Europe. Among the former, laws, mores, and manners are combined; among the latter, they are separated. The Chinese "confused religion, laws, mores and manners; all was morality, all was virtue (19.17). Manners are all-important for the Chinese because the external represents the internal, and "manners represent mores": "they wanted each to feel at every instant that he owed much to the others; they wanted every citizen to depend, in some respect, on another citizen" (19.16). The European mores, by contrast, are those of individualism. Montesquieu accordingly distinguishes between the civility emphasized by the Chinese, and European politeness, which instead of connecting citizens, is rather "a barrier that men put between themselves" (19.16; cf. 19.27, 331).

The reason for these distinctions is in the different religions of these peoples. Chinese religion unites religion, laws, mores, and manners in its ceremonial "rites" (19.17). The "precepts of rites are in no way spiritual," and they do not attempt to "stamp spirits" with "something intellectual." "The Christian religion," by contrast, "by the establishment of charity, by a public worship, and by participation in the same sacraments, seems to require

that everything be united…" (19.18). Montesquieu links the Chinese "separation" of families with despotism, citing 4.3 and 19.12 (19.18, n21). There seems to be a kind of paradox: among European peoples, there is a distinction between religion, laws, mores, and manners that does not exist among the Chinese, but in the Christian religion things are united and public whereas among the latter things are separate, and "each household is a separate empire" (4.3). The paradox can be resolved if we see that Christianity is a "singular institution" that "confuse[s]… things that are naturally separate" (19.21), one that is legislated rather than emerging out of the mores and manners of the nation (19.14). In the context of Christianity's spiritual, intellectual, and public concern, separation and distinction are necessary. Montesquieu recalls barbarian mores as a vehicle of effecting that separation. Accordingly, in the next chapter he distinguishes between peoples who have good mores and thus simple laws, and peoples who "are not religious" (and implicitly have bad mores), and thus do not have simple laws (19.22). But his example of good laws is when trials can be prosecuted "speedily" through "oaths," and his counter-example is when oaths can only be relied upon when those who swear them are "without interest." In book 28 on the revolutions of French civil law, we see that it is especially the Christian legal spirit that requires the use of oaths, whereas it is the barbarian spirit that eschews oaths and instead looks to the interests of the parties. Thus, in effect Montesquieu argues that Europe suffers from a sort of chimerical union between forms of law: those established for citizens with good mores, and those established for those with bad mores.

In chapters 23–26, with Roman examples, through a series of "continuation" chapters, we get an example or description of this kind of union. The proliferation of laws show the degradation of mores. In uncorrupted early Rome, guardianship is given to the closest heir,

and the law is "attentive to the preservation of the goods"; in corrupt, later Rome, guardianship is given to the mother, and the law is "attentive to the preservation of the person of the ward" (19.24). The applicability of all this to Europe becomes clearest in chapter 26, where Montesquieu distinguishes between "the earlier mores and manners of the Romans" and the later "mores seeking to establish themselves," writing that "the usages of the East had taken the place of those in Europe." The example itself is trivial: whereas among the Romans a wife could repudiate her husband for "chastis[ing] his wife in the manner unworthy of a freeborn person," in the East, a "eunuch of the empress, wife of Justinian II," was able to threaten her as if she were a child. Like many laconic chapters, this gives us little to go on, and one must take into account the context. Montesquieu distinguishes here between the mores of the free and those of eunuchs, those of citizens and those of subjects. This chapter precedes the long chapter on the character of the English, who value their liberty and their individuality above all. It is hard to escape the conclusion that Montesquieu considers Christianity to have contributed in some way to this change in mores, and the English model as in some way an antidote.

Religion on the English Model

A clue to understanding the place of the English chapter in this book is the use of "character" in its title instead of "religion." In the titles or first sentences of chapters 17–19, Montesquieu refers to religion, laws, mores and manners"; in 17 and 19, they are in that exact order, whereas in 18, in accordance with the primacy of manners among the Chinese, the places of religion and manners are switched. In 16 and 21, he writes of mores, manners, and laws in the first sentence or title. In chapters 7 and 10 we get the "character" of the

Lacedaemonians, Spanish, and Chinese, but only in 27 do we get "character" paired, in the place of religion, with laws, mores, and manners. This term first became thematic in book 14, where it was tied to "spirit," as a sort of shape or form of the spirit.[204] There we saw a general description of the character of spirits in cold climates: "more confidence in oneself," "less desire for vengeance," "a higher opinion of security," "more frankness," and so on (14.2, 232). The climate of England was particularly described as being productive of a restlessness and dispassion that makes the people less inclined to anger at individuals, and less prone to tyrannical projects (14.13). Finally, the German climate was seen to make "the passions… calm" (14.14). Montesquieu explains this as in terms of the imagination: "Their laws found in things only what they saw, and they imagined nothing more." But when they "moved to Spain" and became Visigoths, "the law suspected everything in a people capable of suspecting everything." These recollections help us to understand the connection between the character of the spirit and religion, and thus to see why the English might be "indifferent" to religion.[205]

In criminal law, Montesquieu focuses on eliminating the feeling that one is punished personally, held in judgment by the one who has been wronged. Jury trial, and the judicial power in general, are to be invisible, as if they were "null" (11.6, 158; cf. 4.3): one must not feel that one has fallen into the hands of one inclined to do him harm (11.6, 157). The passions, so inflamed by the imagination of a personal wrong, must not be part of the judicial process. In the distinction of the kinds of crimes and their penalties, Montesquieu especially warns against the idea of avenging the divinity and inflaming the passions of

[204] 14.1, editors' note a.

[205] Here, the difference between the effects of the climates of the North and the South may serve as a proxy for the difference between Catholicism and German barbarism, or between Catholicism and Protestantism.

"timid and brash consciences" (12.4, 190). Later, in the chapter "On the motive for attachment to the various religions," the focus is likewise on the imagination (25.2). Montesquieu describes a sort of paradox. Different religions fit differently with our "way of thinking and feeling" (*façon de penser et de sentir*). However, it is not the intellectual part of ourselves that attaches us to intellectual religions, but the feeling part. In Montesquieu's description, the "worship" of "a spiritual being" inflames the passions connected to vengeance: "It is a happy feeling that comes, in part, from the satisfaction we find in ourselves for having been intelligent enough to have chosen a religion that withdraws divinity from the humiliation in which others had placed it" (25.2, ¶2). When we combine the ideas with "things that can be felt," we are even "more zealous" (¶3). We like "the idea of a choice made by the divinity" for us, and to be distinguished from non-believers (¶5). Montesquieu writes that Muslims "think they are avengers of the unity of god," but from other places we have seen that he also connects Christianity with the idea of avenging God (e.g., 12.4, 25.13). Doctrines of heaven and hell are further motives of attachment to religion: "Men are exceedingly drawn to hope and to fear…" (¶7). However, the character of the spirits of the northern peoples is much less inclined to hope and fear; hence, intellectual and spiritual religions are not attractive to them. Paradoxically, though, the fact that they do not have spiritual and intellectual religions, and consequently are not as attached to their religions as those that do, means that they are tolerant of and open to those very religions (25.2, ¶2; 25.3, ¶5).[206] As barbarian peoples conquer Christian ones, it is the Christian religion that conquers the barbarian religion. This leads to the uneasy combination of the barbarian

[206] Schaub, "Believers and Barbarians," 226.

and the Christian spirits.[207]

Montesquieu's description of the English model is an attempt to resolve these spirits, to show how the barbarian independence, strength, wariness, and dispassion can be combined with the concern with ideas and belief that is found in Christianity, an intellectual religion.[208] This union is summarized at the end of book 19: "The character of the nation would appear above all in the works of the mind (*esprit*) in which one would see a withdrawn people, each of whom thought alone" (19.27, 332). Here, the emphasis is on the strength and self-rule of every individual such that no one regards the different opinions or beliefs of any other as an affront to his own liberty or morality: "each would regard himself as the monarch"; and "As no citizen would fear another citizen, this nation would be proud, for the pride of kings is founded only on their independence." The question of the truth of their opinions and beliefs, whether in terms of politics or religion, is secondary to the freedom of each individual to reason: "In a free nation it often does not matter whether individuals reason well or badly; it suffices that they reason…."[209] As character stands here for religion, and public reasoning for the protection of one's "way of thinking" in the way of religion (19.27, 330), Montesquieu here describes the privacy of conscience, men "living mostly alone with themselves" who consider their religion to have been affronted and in need of protection only when they are "obliged to change" the one they have, if they do have one, not when the particulars of their belief are contradicted, whether privately or publicly (19.27, 332, 330). Property is the means of that protection, and unites all in their concern for the

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[207] This point is underscored by the difference between the Han Chinese and the Tartars; the latter, though free, pastoral barbarians, adopt the slavish customs and laws of the former upon conquering them. See 17.5 and Chapter 3, "Part 3: Barbarian Mores," above.

[208] See *Pensées*, 854, 1052; and *Notes on England*, in *OC* 1:883–84.

[209] See 24.4.

protection of religion, even when there is a multiplicity of sects or widespread lack of religion (19.27, 330). Religious property, that is, that aspect of religion in need of protection, is not the doctrinal content of the religion, but what we might call "respect for religion," or in other words, privacy of conscience.

Parts 4 and 5: Religion, Commerce, and Liberty

Although I have argued that Montesquieu anticipates his arguments in parts 4 and 5 on commerce and religion in part 3, on mores, and especially in the final chapter of that part, it will be helpful here to make those arguments more explicit though a brief examination of these later books.

In part 4, Montesquieu makes a distinction between the commerce of luxury, connected to violence and despotism, and economic commerce, which is connected to peace and security. The one has as its object "to procure for the nation engaging in it all that serves its arrogance, its delights, and its fancies" (20.4), while the other is common, widespread, and even though it is conducive to "the greatest enterprises," consists in "gaining little" and "gaining continually." Montesquieu's great challenge is to connect the mores of the barbarians, who are not commercial, to modern commercial republicanism, and to make it the vehicle of the protection of religious beliefs that the barbarians did not have. Montesquieu's model is, again, the English: "This is the people in the world who have best known how to take advantage of each of these three great things at the same time: religion, commerce, and liberty" (20.7). What unites the three is the opinion of security. The opinion of security is carried beyond one's enclosure to one's enterprises around the whole world: one is willing to "undertake everything, and because one believes that what one has acquired

is secure, one dares to expose it in order to acquire more" (20.4, ¶7). Thus even as one jealously protects his property, he is willing to expose it or exchange it.

But one is not secure as long as property can be taken away on the pretext of impiety or unbelief. The barbarian hardness itself lends a spirit of rapine to princes who see an opportunity through Christianity to take that property.[210] What Montesquieu means by "barbarism" in part 4 is complicated by this connection between the barbarian and Christian spirits. He had described the barbarians, against our expectation, as gentle and tolerant. Yet they are also prone to great physical cruelty and painful proofs in criminal trials. In the first chapter on commerce, Montesquieu excuses his promotion of commerce, which "corrupts pure mores," for the fact that "it polishes and softens barbarous mores" (20.1). The mores of the paradoxically violent but gentle barbarians are far from pure, but they do not have the "destructive prejudices" that commerce cures, leaving "gentle mores" in its wake. Those prejudices are not the exclusive property of the Christian spirit either. Rather, they emerge out of the combination of the barbarian and Christian spirits, and the ignorance of the way these spirits have combined in the European character (Preface, ¶13). In Montesquieu's promotion of commerce, barbarian toleration and gentleness does do much of the work, but the honesty and industry of Christianity does a great deal as well. It is worth noting in this context that Montesquieu writes in the second chapter on commerce of the importance of "hospitality" among the Germans. This obligation is just the complement of "banditry," or piracy, something greatly opposed to commerce (20.2).[211] Yet when Montesquieu writes of usury in the chapter titled, "How commerce in Europe penetrated barbarism," it is Christian

[210] See 25.13, 492
[211] Cf. *Pensées*, 575, 1391, 1602, and 1604.

theologians he blames for the opposition to commerce, writing that the "schoolmen" were delighted to find the criticism of "lending at interest" as unnatural in Aristotle, though the real source of their opposition to it was "the gospel" (21.20, 387).[212] The "barbarism" he goes on to describe is the persecution of the Jews: the taking of their goods on the grounds of their unbelief or even because of their conversion (388). Later in this chapter, he attributes such "avarice" to "Machiavellianism," a heavy-handed, authoritarian rule which allies itself with the "schoolmen" or "theologians" in order to avail themselves of the property of Jewish moneylenders (389).[213]

The most important thing, for Montesquieu, with regard to religion, is that counsels of perfection should not be confused with precepts, "for perfection does not concern men or things universally" (24.7). Commerce that depends on lending at interest, from the point of view of counsels of perfection, is "violently linked to bad faith" (21.20, 389). Montesquieu contrasts such counsels with the administration of commerce, or what he calls "the police":

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212 See also *Pensées*, 1738, and especially 2154.

213 Montesquieu uses the Machiavellianism "every day" (*tous les jours*) in the sentence in which he says we are being cured of Machiavellianism. Cohler et al. have sometimes chosen to translate this phrase as "continue to," "continually," "daily," or "everyday." But see Mansfield, *Taming*, 219. He helpfully points us to 12.11 and 12.13 as examples of when moderation is necessary and how one should not take thoughts and ideas as treasons. See also the use of "tous les jours" in 12.12. The revolution from religion to commerce changes the definition of what is and what is not "an everyday occurrence" and an "actionable act." The central instance of "tous les jours" is 19.27, 331: "As those who govern would have a power that revives, so to speak, and is remade [every day]…." For other instances of Montesquieu's apparent rejection but actual embrace of Machiavellianism, see 6.5, 77–78 with 6.7 and *Discourses*, 1.40.4; and 1.45.title, §3; and *Spirit*, 20.4; 21.11, 375; 22.3, 401; 22.13, end; and 26.24. For the important instances of "every day" (*ogni dì* or *ciascuno dì*) in Machiavelli's *Discourses*, see 1.1.2, 1.2.3, 1.37.1, 1.45.title, 1.45.3, 1.46.1, 1.49.3, 1.55.2, 2.21.2, 1.31.1, 3.31.4, 3.49.title, and 3.49.1. On Machiavelli's "moderation in councils" and opinion about "great acts of authority," especially in the context of France, see *The Prince*, ch. 19, 114. For a recent general treatment of this theme, see Randal R. Hendrickson, "Montesquieu's (Anti-) Machiavellianism: Ordinary Acquisitiveness in *The Spirit of Laws*," *Journal of Politics* 75.2 (2013): 385–96. Cf. also Mansfield, *Taming*, 216–17, 240, 245–46. For biographical evidence of Montesquieu's interest in Machiavelli, see Shackleton, *Montesquieu,* 22, 127, 265–66, and especially 142–44, 152, and 268–69. See also Schaub, *Erotic Liberalism*, 12 and 161–62n42, for the argument that Montesquieu indicates his turn from Machiavelli by not writing an epistle dedicatory in his epistolary novel Persian Letters and thereby moving from a Machiavellian calculation about power to an appeal to public opinion. Schaub also gives there—as Hendrickson does—a brief bibliography of the scholarship on Machiavelli's influence on Montesquieu.

"It is perpetually busy with details; therefore, great examples do not fit it. It has regulations rather than laws"; further, "one must not confuse great violations of the laws with the simple violation of the police; these things are of different orders" (26.24; see 20.18). Commerce, like judgment of one's guilt, must not be ruled by great personal actions that terrify and enervate the spirit, destroying industry and enterprise. As in criminal law, where in the regime ordered toward liberty the judicial power is impartial, invisible, and null; so in commerce, where the Jews "invented letters of exchange, and in this way commerce was able to avoid violence and maintain itself everywhere, for the richest trader had only invisible goods, which could be sent everywhere and leave no trace anywhere" (21.20, 389). Montesquieu sees that this invisible property is the means of protection for the Jewish conscience. Whether it is a means to protect their religion and avoid persecution for their faith, or a means of protecting their property which could previously have been taken on the specious grounds of their unbelief, is beside the point. The effect of Montesquieu's work is even to equate or conflate the two: property stands in for conscience, and conscience for property.[214]

The connection between religion and commerce culminates in the very odd book 23, "On laws in their relation to the number of inhabitants." It is especially odd for us because in it Montesquieu implies that Christianity, due to its overzealous counsels of perfection, leads to depopulation (23.21).[215] As we have shown, Montesquieu uses the Romans as the

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[214] As a sort of echo of this, in the midst of the discussion of money in book 22—a buffer book between books that are really about judgment and religion, as book 13, on taxes, served as a buffer between book 12 on criminal law and book 14 on the character and the heart—Montesquieu writes that "it is by the nature of the thing indifferent whether silver should be sent [to another country] or letters of exchange should be given" (22.10, 408). See again 19.14, ¶8; 19.19, ¶3; and 19.27, 330 on the indifference of law and the English toward religion.

[215] Today, of course, religious belief is tied to greater fecundity, secularism to lack of propagation. Montesquieu's argument makes more sense in a historical context where monasticism is widespread and the

stand-in for the influence of the Christian spirit in part 6, but also in *Spirit* generally. In book 23, he argues that the Romans depopulated through their conquests, subsuming various populous peoples into one (23.18–20). As the wealth taken from war and their provinces disinclined the people to having large families, and their wars further killed off their soldiers, the Romans had to make laws to encourage propagation (23.20–21). However, Stoic philosophy and then Christianity brought "an idea of perfection" and the model of "a speculative life" and consequently "distance from the cares and encumbrance of a family." It even gave this "character" to "jurisprudence" in the Theodosian Code, which, Montesquieu writes, "is but a compilation of the ordinances of the Christian emperors" (23.21, 447–48). The laws "made with Christian perfection as their object" no longer encouraged propagation, as they wished to give authority to "bishops" and the Church rather than to families; they wanted to "[remove] from the father the ownership of the children's goods" (448). Marriage and childbirth became secondary to the ideal of celibacy, a counsel of perfection that Montesquieu says should be given to the heart, rather than dictated to the spirit of all people through precept or law (449; 24.7). In his effort to combine religion, commerce, and liberty thematically, Montesquieu makes the Christian religion not only the enemy of the everyday and ordinary transactions of commerce, of the propagation of money, but of the propagation of life itself. "The principles of religion," he writes, have greatly influenced the propagation of the human species," sometimes encouraging it, but sometimes "run[ning] counter to it, as they did among the Romans who became Christians" (448–49). Christianity has allowed the perfect to become the enemy of the good in commerce with the

celibate life seen as the highest life. Montesquieu had several aunts and uncles who were monks, priests, and nuns. Both of his sisters were nuns, and his one surviving brother, a priest. See Shackleton, *Montesquieu*, 2, 4; and *Spirit*, 5.2, ¶2.

opposition to usury, and in religion, with the opposition to the encouragement of propagation.[216]

Books 24–25: Religion and Commerce on the Barbarian Model

As our main concern in this study is Montesquieu's understanding of property, an extensive treatment of part 5, on religion, would be outside of the scope of this work. However, a short account must be given of how the recasting of property as a *palladium* around conscience is reflected in the treatment of religion. In, short, Montesquieu barbarizes Christianity, ascribing to it the same effects that he attributes to barbarian mores and to commerce, which itself takes on a barbarian form.

In book 24, Montesquieu vaguely acknowledges that Christianity is the "true religion," but over the course of the book, he emphasizes the utility of religion rather than its truth, and suggests that Christianity is especially useful for softening mores (24.1, 24.4). In the ostensible defense of Christianity from Bayle's attacks, what becomes important is not the doctrinal content of the religion but whether or not it makes one a good and agreeable person. Montesquieu redefines Christianity in this light: "no doubt [it] wants the best political laws and the best civil laws for each people" (24.1), it "makes princes less timid and consequently less cruel" (24.3), and it is "full of common sense" (24.26). In effect, he argues that religion should act as commerce does, to soften mores (20.1). In Montesquieu's hands, religion becomes what we would call 'spiritual,' although in Montesquieu's language, it

[216] Montesquieu brings these together cleverly. In a chapter "On lending at interest," he writes, "To lend one's silver without interest is a very good act, but one senses that this can be only a religious counsel and not a civil law" (22.19). If lending is prohibited, it will happen anyway, and "usury is established"; if usury is prohibited, it will only become even more terrible (22.19, 22.21). Thus: "Extreme laws for good give rise to extreme evil" (22.21).

speaks to the "heart" with counsels but gives "few precepts" to the spirit, which is ruled by civil law (24.6–7). He places claims to doctrinal truth in the category of counsels not affecting the law, and not useful politically. If religion is to soften mores, it must lead to "reconciliation" rather than sectarian violence, but nothing is more antithetical to this reconciliation than opposite claims to the truth (24.17–19).

In this context, Montesquieu indicates the *fredum*, the expiation of crimes, and pecuniary penalties among the barbarians: "Among the Germans, hatreds and enmities were inherited from one's near relations, but these were not eternal. Homicide was expiated by giving a certain quantity of livestock" (24.17). Without evidence, Montesquieu ties this practice to religion: "I believe indeed that the ministers of religion, who had so much influence among them, took part in these reconciliations" (24.17; see 18.31).[217] By contrast, Christianity, not mentioned by name but obviously indicated, should not have "inexpiable crimes" because it, peculiar among religions, "envelops all the passions" and "is no more jealous of acts than of desires and thoughts" (24.13).[218] Because it is so concerned with the person's inner thoughts and desires, "puts a great mediator between the judge and the criminal," and emphasizes love and repentance, it "should not have inexpiable crimes." Though it makes one feel that "no crime is inexpiable by its nature," it does make one feel that "a whole life" can be inexpiable. Given how troubling this is to the individual, "it would be very dangerous to harry mercy constantly with new crimes and new expiations," leaving

[217] It is possible that Montesquieu's "I believe indeed" (*je crois bien*) is not the indication of an intellectual guess, but a subtle portent of the pacifying commercial religion to come.

[218] See *Leviathan*, 46.37: "There is another error in [the] civil philosophy [of the civil philosophy of the Church], which they never learned of Aristotle (nor Cicero, nor any other of the heathen): to extend the power of the law, which is the rule of actions only, to the very thoughts and consciences of men, by examination and inquisition of what they hold, notwithstanding the conformity of their speech and actions." It is important to note in passing here that Montesquieu but not Hobbes holds that the requirement of conformity of speech is inconsistent with the freedom of conscience.

the individual "never settled with the lord," constantly contracting new debts before the old ones can be repaid (24.13). Instead, the model of religion should be, as with civil laws, "to make good citizens of men" (24.14); this means that religion should not have a multiplicity of precepts which "cause what is indifferent to be regarded as necessary," because that often leads to "what is necessary [being] considered as indifferent" (24.14, 469). Montesquieu's example is Genghis Khan, who considered inconsequential things like "[leaning] on a whip" to be "a capital crime," but did not believe there was any sin in violating the lives, liberties, or property of others (468–69). Religion, just like the civil law, must consider the protection of lives, liberty, and property to be of a "higher order than all precepts" (26.7).

Book 25 is the book on commerce within the part of *Spirit* on religion; it is the reflection of commerce in religion. As mores are concerned with the internal, and manners with the external (19.16), and commerce—which deals with everyday external things that should be ruled by the police, or regulation, rather than law—stands in for manners (19.12), so does book 25 address the "external police" of religion while book 24 is about the relation of the laws to religion "within itself" (books 24–25, titles). In the content of the book we can see this most clearly in how many chapters there are on the clergy and its wealth.[219] Part of the argument is that princes claim to be interested in belief, in what is in people's minds, in order to get at their property (25.13). In Montesquieu's hands, that argument is not merely that people are greedy and will use whatever pretext they can to get filthy lucre, putting the low above the high. It might seem to us, because of his promotion of commerce as the surest way to soften mores and promote political and religious moderation, that he, like other modern thinkers, holds that the surest and most reliable motives are always the lowest.

[219] 25.5 is the most explicit example.

Yet the tone of this book, and especially of the "humble remonstrance to the inquisitors of Spain and Portugal," in which he says that the Inquisition will be cited "to prove that [the peoples of Europe] were barbarians" (25.13, 491–92), shows otherwise. The Montesquieuan psychology is more complicated than that: it is actually because those who are motivated by the high sometimes do such terrible things that the protection afforded by property in the liberal, republican, and commercial context is so necessary (see again 12.4, 190).

The complexity of this understanding has further proof in the way that commerce in this book is connected to religion and to barbarian mores. Montesquieu does not simply want to "detach[] the soul from religion" through commerce, "by favor, by the comforts of life, and by the hope of fortune," making us forget about religion, and indifferent to it rather than indignant about it (25.12, ¶3; see 19.27, 330). The seductive, narcotic effect of commerce is part of his project, though all of these remarks are made in the hypothetical context of whether penal laws should be used in order to support or oppose religion—something Montesquieu opposes, offering the softer, indirect commercial route as an alternative. Something of an answer to what inspires fear must be found in religion, or whatever replaces religion: "Religion has such great threats, it has such great promises, that when they are present to our spirits, no matter what the magistrate does to constrain us to abandon it, it seems that we are left with nothing when religion is taken away, and that nothing is taken from us when religion is left to us" (25.12, ¶2). If commerce 'replaces' religion, commerce must in some way speak to what religion speaks to in the heart and the spirit. The chapter we are addressing again here argues that as "religion also has its penal laws which inspire fear," it should not itself be inspired through fear (¶1): the civil law should not add to the terror of religion, but also religion should not add to, but should be a

refuge from, the terror of the law.[220] This is why "the Christian religion is so odious in Japan": as Christianity and Islam tend to encourage the conception of justice as a kind of divine vengeance and forgiveness (e.g., 12.4, 190), it is a great threat in Japan where "punishing is regarded as vengeance for an insult done the prince" (25.14). This is also why religion is so important in despotisms; it can limit the severity of the despot or provide a refuge from the terror of the law (see 5.14, 61; 12.29).

Book 25: The Portable Refuge

The notion of religion as a refuge from the terror of the law, and the implicit converse of the law as a refuge from the terrors of religion, is crucial for Montesquieu's relation of commerce to religion through the concept of property as privacy of conscience. In a chapter, "On temples," in the aforementioned book on commerce within the book on religion, we are given an indication of this notion (25.3). The chapter distinguishes between agricultural peoples, that is, those with civil law and regulation, or "peoples with a police," who "live in houses," and consequently conceive of the idea of a "house for god"; and those, like the pastoral barbarians, who do not live in houses, do not have civil law and regulations, and do not have temples, or houses for god. Montesquieu's challenge is to blend these two: he wants the tolerance and portability of the barbarian religion and the sense of protection afforded by temples in the civilized religions.

Barbarian tolerance, as Diana Schaub has noted, is a two-edged sword: it does not persecute and does not terrorize the spirit in the way that intolerant religions do, but it is empty, and thus open to infiltration and conversion at the hands of the intolerant, or at least

[220] See the Conclusion, "Despotism, Then and Now."

by the dogmatic.[221] Yet this empty tolerance offers something to the modern religious context. Genghis Khan disapproved of the Muslim requirement of making a pilgrimage to Mecca because he "could not understand that one could not worship god everywhere" (25.3, ¶4). Montesquieu allows readers perhaps to laugh at the barbarian's simplicity, as they did in the previous book (24.14), but he follows up this remark with a comment about how "tolerant" the Tartars and the barbarians who conquered the Roman Empire were due to their lack of temples, and consequently their lack of attachment to religion. This is made attractive to the reader through the fact that it was this very tolerance and weak attachment that made barbarians and savages easy to convert to Christianity (¶5).

Settled, civilized peoples, on the other hand, "think of temples as an asylum for criminals," as "the divinity is the refuge of the [unhappy]," and "no people are more unfortunate than criminals" (¶6).[222] Montesquieu wishes to adapt this notion to barbarian universality and portability, such that one can have a refuge everywhere in one's property. In what remains of this chapter, however, he indicates all the ways that using temples as asylums is problematic, creating perverse antagonisms between the people and the needs of good order. When they serve as a refuge not only for those who commit murder unintentionally, but also for "great criminals," they lead to a "contradiction": "if the criminals had offended men, there is even greater reason for them to have offended the gods" (¶7). Yet, concerning crimes and penalties in book 12, Montesquieu had said that men's crimes should be judged according to man's weakness, and not God's greatness (12.4). If temples should not serve to drag God into the business of defending human criminals,

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[221] Schaub, "Believers and Barbarians," 228.

[222] The Cambridge translators (Cohler et al.) have this passage as "no people are more fortunate than criminals," but this is a simple mistake, as the French reads "*il n'y a pas de gens plus malheureux que les criminels*."

such as "insolvent debtors and wicked slaves" (¶8), what about the other way around: could the temple, or at least one's home or property, serve as a defense against men for the alleged crime of having offended God?

Montesquieu closes this chapter by considering the "laws of Moses" in this regard, citing *Numbers* 35 in a note (¶9): "The Jews had only a portable tabernacle, which changed its place continually; this excluded the idea of asylum." He seems here to reject the idea of a portable temple, but of course is talking about an actual, physical, and not metaphysical or metaphorical space. Yet what succeeds this does not follow: "It is true that they were to have a temple, but the criminals, who would have come there from everywhere, could have disturbed the divine service." Therefore, Montesquieu says, they established sanctuary towns where accidental murderers could find refuge (25.3, 482). Why does this consideration of the disturbance of the divine service not affect other asylum temples? Further, why could murderers not be "driven out of the country, as they were by the Greeks"? The answer is that in driving out such criminals, "it would have been feared that they would worship foreign gods." This is a subtle indication that the character of the Jewish religion transforms what the asylum is for, into something arguably more sensible than the pagan notion. The Jews care that their people worship the true God, but they don't want the polluted to disturb their divine service and especially to inflame the passions of "the relatives of the deceased." The cities of asylum are, in Montesquieu's story, ways of keeping the polluted criminal within the fold while protecting him from the actions of those who feel that it is their sacred duty to exact vengeance on them. It is not yet the way that commerce with its invisible property protects the individual from persecution on the grounds of his belief, but it is a movement in that direction. Montesquieu in his order of presentation himself moves in that

direction in the following chapters, which are on ministers, the clergy, monasteries, superstition, the pontificate, toleration, apostasy, penal laws in religion, the Inquisition, and evangelization (25.4–15).

The climax of this presentation is in the oft-quoted passage in which Montesquieu describes "a more certain way to attack religion": "by favor, by the comforts of life, by the hope of fortune," and so on (25.12). This generally indicates the effect of commerce, a kind of religious re-founding, as many commentators have pointed out.[223] But this analysis misses something closer to the surface, or at least the surface of the text taken as a whole. When Montesquieu writes "On changing religion" (25.11, title), there is no indication that he is talking about changing, or replacing Christianity. It is much more evident that what he has in mind is the effect that Christianity had on Europe; that is, he is talking about how Christianity spreads and enforces itself. The penal laws chapter is a warning against the use of penal laws to enforce Christian belief, as the "humble remonstrance" of the next chapter, described ironically as "most useless," clearly indicates (25.13, title, ¶1). The "new" religion of chapter 11 is not commerce, but Christianity; the "old" religion is not Christianity, but the barbarian mores which are the foundations of barbarian political law, the grounds of their citizenship. This is partly indicated by the suggestion that the new religion "often resists [the climate]." Elsewhere, Montesquieu connected the German barbarians to calm passions and lack of imagination, and Christianity to strong passions and a powerful imagination (see 14.14, 12.4). It was because of this lack of consonance between the religion and the connection between climate and mores that Christianity "suffered the unfortunate division that divided it into Catholic and Protestant," and that Northern Europe, with a "spirit of

[223] For example, Pangle, *Theological Basis*, 101–2.

independence and liberty," became Protestant (24.5). Of course, Montesquieu writes this chapter in such a way that it could be adaptable to other cases of "changing religion," but it is the effect of Christianity in Europe that he describes immediately here, not the effect of commerce on Christianity. The argument is that as Christianity brings with it a spirit that conflicts with the barbarian mores at root of the law, "at least for some time," Christianity in Europe has made for "bad citizens and bad believers" (25.11).

In the next chapter, then, while Montesquieu is certainly describing the effect of commerce, he is doing so in the context of Christianity's tendency to want to use penal laws "in the matter of religion" and recommending a new way, not describing how to destroy Christianity. Of course, since he promotes commerce, and commerce could serve to "detach[] the soul from religion," he could be promoting what would destroy Christianity. But much is lost by ignoring that Montesquieu explicitly describes the effect of the barbarian conquest of the Roman Empire and the subsequent Christianizing of the barbarians, and does not describe a commercial conquest of Christian Europe. Insofar as he does suggest that such a conquest is happening or will happen, he shows how it will work through the model of the conflict between barbarian mores and Christianity, showing us how these spirits of the law previously have combined in undesirable ways. If we see how they have combined poorly, we can recombine them in new and better ways.

"[A] state does not change religion, mores, and manners in an instant," Montesquieu writes (25.11). Thus it is reasonable that he could still be talking about an incomplete Christian transformation of the barbarian spirit, and the horrors that could result from a toxic mixture. Commentators who argue that he pushes for the undermining of a rock-solid but somehow also problematic religion miss this entirely. The "humble remonstrance to the

inquisitors" is a partial demonstration (25.13). What is the argument the "eighteen-year-old Jewess" makes? You say you are Christians, but you act as "barbarians" (492). You fail to live up to your principles: "You want us to be Christians, and you do not want to be Christians yourselves" (491). At least overtly, Montesquieu proposes that Christianity give up penal punishments and instead preach to "hearts and spirits." Penal punishments are connected to barbarism. Thus the inquisitors represent a bad combination of Christian concern for belief and barbarian cruelty. The alternative is something like what Montesquieu has the anonymous author of the remonstrance write: "the respective rights of men over each other, the empire that one conscience has over another conscience." Of course, Montesquieu does not make such arguments in his own name, arguments based on the progress of "natural enlightenment," or spirits "enlightened" by "philosophy." Rather he promotes commerce as a kind of reorganization of the barbarian and Christian spirits.

Book 26: Sacred Site

After the chapter on temples, Montesquieu naturally gives us a chapter on ministers (25.4). "[J]ust as each citizen takes care of his house and his domestic business," someone needs to take care of the temple (¶3). Just as barbarians do not have temples, "peoples without priests are usually barbarians" (contrast 18.31). If the neo-barbarian is able to worship God everywhere, perhaps each person then functions as his own priest, and of his own religion, and is "indifferent" to the differences between "religions" (19.27, 330). One does not become "indignant" at the impiety of others, but is rather "lukewarm," dispassionate about the transgressions of others (25.12).[224] However, this does not mean that Montesquieu

[224] The Cambridge translators (Cohler et al.) have here rendered *jette dans la tiédeur* as "leads… to indifference."

imagines that the spirit of Christianity is replaced with the spirit of commerce; rather, it is channeled into conscience, into a private right. Book 26, as we have said, is about "the order of things." It is not correct to say that Montesquieu replaces commerce with religion. It would be more correct to say that Montesquieu wishes to replace the current Christian understanding of the order of things with a new Christian understanding of the order of things. That new order is a transformation of the barbarian spirit into a commercial context, but it is not a destruction, but rather a reorientation of the Christian spirit.

Much of this new understanding of the order of things is familiar to us as the teaching of modern natural right. For instance, Montesquieu gives us examples of peoples who lost battles and regularly had their security compromised because of their observance of religious duties, and asks, "Who can fail to see that natural defense is of a higher order than all precepts?" (26.7)[225] But Montesquieu's treatment is unique in that he does not allow religion to slink into the background, or argue, as Hobbes does, that despite occasional appearances to the contrary, it is in full agreement with the conclusions of natural law as discovered by reason. The book begins with a chapter outlining nine types of laws which govern men (26.1). Though only two of them are explicitly about religion ("divine right, which is that of religion," and "ecclesiastical right, otherwise called canonical"), in effect all of the subsequent chapters are about religion, contrasting a more originally Christian understanding of the order of things with a new order.[226] Thus it is not simply a matter of reducing the influence or priority of divine or ecclesiastical right and laws, but of providing a new

Other renderings as "indifferent" are from the French cognate.

[225] This is a curious rhetorical question, given that Montesquieu has just finished giving several examples of peoples who did "fail to see" that.

[226] Schaub, "Montesquieu's Legislator," 157.

understanding of these laws.

Particularly important is a new understanding of canonical right. Montesquieu distinguishes between canonical and civil right in this way: "Canonical right pays attention to the place; civil right, to the thing" (26.8). He commends the Roman civil right, which punishes theft from a "sacred site" only as robbery, and not as sacrilege. The difference between them in this case is that the imputation of the latter crime involves an accusation that the criminal intended to desecrate, to steal from *this* place because it was a holy place, whereas the crime of robbery is only about what was stolen, and not the beliefs or sinister intentions of the thief, which cannot be known. Montesquieu gives another example, seemingly unrelated, in the next paragraph: formerly, only a husband could ask for a separation on grounds of infidelity, but "the courts of the church," "contrary to the provision of the Roman laws," introduced the converse practice, a wife repudiating her husband for infidelity. This is because the church courts paid exclusive attention "to the maxims of canonical right" and "to purely spiritual ideas" rather than to the requirements of civil law. Civil law is concerned with what can be seen and known, and the "infidelity of women" is marked by "certain signs," namely the pregnancy and the appearance of the child, that are absent in the other case.

Several other chapters in book 26 bear witness to Montesquieu's identification of the Christian spirit with concern with what is invisible, secret, and unknown. It is the hidden theme of the chapters leading up to the two chapters distinguishing between the political and civil right, where Montesquieu writes of the "*palladium* of property" (26.15–16), that which shields the individual and his conscience from the over-reach of political and ecclesiastical powers. Chapter 9 distinguishes between the "Roman law" and the laws of Constantine and

especially of Justinian, who acted "in another spirit," not allowing wives of husbands who had gone missing in war to remarry, "assum[ing] a crime, that is, the desertion of a husband, when it was very natural to assume his death" (503). Chapters 11 and 12 are about how the Inquisition, by looking into the conscience, makes "dishonest people," rewarding false confessions with the avoidance of punishment and presuming to judge how "repentant" the one being investigated is. Montesquieu writes that "human justice sees only acts," but "divine justice… sees thoughts." The *palladium* of property is not only meant to protect the individual from the political power, but to protect his liberty, including his liberty of conscience; it is meant to protect his *thoughts*. The civil law concerning property is about things the theft of which would be called robbery, but it shields something sacred, a new kind of sacred site, the individual's conscience, the violation of which is a new kind of sacrilege. James Madison puts this understanding best in his essay on property:

> Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.[227]

This new understanding of sacrilege, or the violation of canonical right, which is concerned with place, is tied to a new understanding of the order of things. As we said in Chapter 3, "Book 18: The Salic Enclosure," above, Montesquieu redefines the old Christian natural right as canonical right, and what could be called the canonical law of the barbarians—the customs concerning the sacred—as the new natural right. In the new understanding, it is not

[227] James Madison, "Property," in *The Founders' Constitution*, vol. 1, ed. Philip B. Kurland and Ralph Lerner (Chicago: The University of Chicago Press, 1987), 577–79.

acceptable to take property as long as one does not trample upon the spirit: to take property *is* to trample upon the spirit.

The concern for what is hidden, or for thoughts, that is characteristic of Christianity, does not disappear in this new understanding, but it is countered with invisible protections for this invisible sacred site: the "invisible goods" represented by letters of exchange, or the credit upon which modern commerce depends (21.20, 389); and the "invisible and null" judicial power represented by the jury trial (11.6, 158). These, in the modern regime which has political liberty as its direct purpose (11.5), reproduce the Salic enclosure and the *fredum* of the barbarians in the context of Christian concern for belief.

CONCLUSION

Property and the Privacy of Conscience

The identification of property as the privacy of conscience is the result of Montesquieu's investigation into the "origin" of European laws, an investigation which can be described at the same time as his "purpose" as a "legislator" and his description of a new "order of things" (1.3, 9). We began at the end, with part 6, where we find the description of the "revolutions" of the laws of the Romans and the French (books 27, 28, and 31, titles). These revolutions happened because of the meeting and combination of the distinct Roman, Christian, and barbarian spirits. We end at book 26, where with the description of a new "order of things," Montesquieu has taken into account the implications of commerce, the newest "revolution" (books 26 and 21, titles).

It is conquest which brings together these distinct spirits in ways that transform the meaning and relative importance of the elements making up the general spirit of a nation. The Christian spiritual conquest of the Roman Empire and the barbarian tribes is one such conquest; the barbarian conquest of the Roman Empire is another. Montesquieu concerns himself with each of these, but finally with a third: the commercial conquest of Europe. His work in untangling the various relations of the spirits that met in Europe in previous great revolutions, and in showing the unintended consequences of these meetings, informs his reconfiguration or reorientation of those spirits for a new age. Montesquieu shows how the barbarian understanding of property, and the mores that underlie that understanding, can correct the negative consequences of the meeting of these distinct legal spirits in a commercial context. Montesquieu's obvious admiration for the barbarians should not

distract us from the realization that he describes something new, not merely a resuscitation of barbarian property and mores, but an adaptation of them for a new world. Privacy of conscience is not a barbarian notion, but an innovation of barbarian property for a Christian, but commercial Europe.

While it is certainly the barbarian spirit in criminal judgments that most informs the separation of powers in the English constitution (11.6, 166), Montesquieu's celebration of the institution cannot be described simply as the replacement of one legal spirit—for example, the unitary Roman model—with the barbarian. In Chapter 2, above, we dwelt at length on the opening books of part 2, on war, because for Montesquieu the separation of powers teaching should not be understood only in terms of a distinction of purely formal constitutional elements, but in terms of conflict, conquest, preservation, and peace. Separation of powers represents a kind of peace between warring factions: the different spirits of the law that want different things and demand different things of us. It is a modern truce between spiritual powers, the requirements of politics, and the needs of the individual. As Montesquieu's project above all is to separate and render less terrifying the judicial power, and he finds the historical material for this project in barbarian law, it would be easy to overstate this truce as a new barbarian conquest at the author's hands, a truce on barbarian terms, but it is more accurately described as a restoration of peace with barbarian mores as the inspiration than it is a complete replacement of the Christian and Roman legal spirits with the barbarian one.

The foregoing may suggest to the reader that the distinct spirits—the Roman, Christian, and barbarian—could be mapped onto the three powers of government—the executive, judicial, and legislative—but that would be a mistake, as each understands the

relation, or separation, between these powers differently, and it is the barbarian understanding that prevails in Montesquieu's presentation.[228] However, in terms of the matter of the laws, as opposed to the form of the constitution, there is much that is alien to the barbarian spirit. Book 12 treats different types of crimes—especially religious crimes—and their punishments, and thus deals with the relation between religion and the political laws in a way unknown to the barbarians. It is especially concerned with what is hidden or secret, and what is not or could not be known. We move thereby to the specific problems posed by Christianity, especially disputes and controversies about belief. While, for Montesquieu, the conflation of executive and judicial power is despotic in any context, it is especially terrifying when judgment of one's guilt extends from actions to belief, and punishes not only the body but the soul. Thus book 12—which could be described as a book on that for which one can be judged, and how one can be punished for crimes—demonstrates the importance of the question of book 11, which is how and by whom one is to be judged. Consequently, we see more clearly in book 12 why the separation of powers of book 11 is so important.

Of the distinctions between crimes established by book 12, the most important is that between crimes against religion and crimes against security. This distinction is especially necessary in the context of Christianity because Montesquieu establishes that political liberty is the opinion of security, and one cannot have the opinion of security if one is at risk of losing life and property for religious crimes, which are often hidden, ambiguous, or obscure.

[228] Insofar as one could perform such a mapping, of the distinct spirits onto the powers of government, it would make the most sense to say that the barbarian spirit is preserved in the executive power, the Christian in the judicial, and the Roman in the legislative. However, as the judicial power is subdued and invisible in the English model of separation of powers, the Christian religion is similarly subdued and privatized.

Property must insulate the individual from these kinds of judgments. Moreover, Montesquieu criticizes the Roman conflation of political and civil law, which placed the needs of the state over the needs of the individual. This conflation is especially problematic when the needs of the state are thought to include ensuring right belief and the good order of souls. In such cases, the apparently lower goods of life, liberty, and property have been subordinated to the higher goods of truth, justice, and moral order. Montesquieu's description of property as a *palladium* which insulates the individual from political law and his identification of the public good with the maintenance of the property of individuals is therefore not only a criticism of Roman law, but of Christian rulers, and gives force to the distinction in book 12 between crimes against religion and crimes against security.

Montesquieu does not arrive at the description of the order of things in book 26, however, before treating the barbarian mores in part 3. There he shows, especially with the Salic Franks, a model of independence, strength, and property-as-*palladium* that supports the teaching on political liberty in part 2 and inspires the treatment of commerce and religion in parts 4 and 5. The Salic enclosure is an early form of property that insulates and protects the individual, ensuring his opinion of security. Montesquieu translates it for the modern world, keeping its sense of privacy and security, but making it work to protect religious belief. In book 19, he obliquely describes how Christianity has combined awkwardly with the general spirit of Europe, and gives a picture, with the chapter on English mores, of how it could be adapted to the needs of commerce and liberty. Parts 4 and 5 further bear out this meeting and transformation. In part 4, he describes how the "invisible goods" of "letters of exchange" forced "theologians… to curb their principles" (21.20, 389). Modern commerce makes property into a movable *palladium*, allowing each individual to preserve not only his

property, but also his heterodox beliefs. Modern religion, as described by Montesquieu and transformed by his use of barbarian property, in turn essentially becomes privacy of conscience, embracing the private and sacred character of belief.

At the core of this identification of property as privacy of conscience is the Montesquieuan psychology, with a soul always split in two directions: weak, timid and needful of security, and strong, self-aggrandizing, and needful of recognition. At the root of the terrorizing despot, an insecure ruler; at the root of the pious believer, a prideful tyrant. Montesquieu's teaching on property as privacy of conscience is also split in two directions: within and without. Within, one's property is one's conscience; without, it is the representation of oneself to the world. Within, one has property in one's religion; without, one has property engaged in commerce. What is outside, property in the more tangible sense, represents and protects property in the more spiritual, but nevertheless still very real sense. As religious conscience becomes a form of property to be protected by the civil law, an attack on property in the external sense becomes an attack on the individual's security, demonstrating to him his weakness and the insecurity of his beliefs. Likewise, the only religious crime with which the political law is concerned is an attack on religious conscience, that is, an impingement on the free exercise of religion (25.9).

Despotism, Then and Now

Montesquieu's emphasis on the separation of powers, especially the separation of the judicial from the executive power, his promotion of property understood as the privacy of conscience, and his definition of liberty as the opinion of security, can be united in his emphasis on moderate government and his opposition to despotism. As a reflection of the

Montesquieuan psychology, one way to describe his teaching is that the law must be strong where man feels weak, rigorously guarding his private beliefs, and weak where man feels strong, protecting his property and giving him the confidence to engage in commerce, controlling property through the regulation of "the police" rather than stronger civil laws designed for punishment of crimes against security. Despotism does the opposite, reminding man of his weakness by invading his privacy, and fostering disorder and confusion where man would be inclined to engage in private enterprises for his own benefit, and indirectly, for the benefit of the state. While despotism, insofar as it relies on the peculiarly Christian concern for belief, is a uniquely modern spiritual-political phenomenon, it is adaptable to new contexts, just as adaptable as Christianity is to different political contexts. Just as Christianity in America, in Tocqueville's telling, becomes a bulwark of the individualistic freedom that was born in the forests of German barbarism, the liberal institutions that were meant to protect the individual from the overreach of theological despots become the repository of a public faith, with its own creed, acts of piety, and terror-inducing incriminations. Tocqueville himself does not imagine a new Inquisition; rather, he describes a "soft," paternal despotism in which citizens are told what to think and stripped of strong civic rights and responsibilities.[229] Furthermore, he writes that this new form of oppression is unprecedented, that it is not a new form of tyranny or even despotism.

Nevertheless, one can see in Montesquieu, as a founder of much of the psychological and even theological language of liberalism, the roots of the current liberal order. There is a strange resonance in *Spirit of the Laws* with the language of contemporary academic discourse,

[229] *Democracy in America*, 1.2.7, 245; 2.4.6, 663; and Paul Rahe, *Soft Despotism, Democracy's Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect* (New Haven: Yale University Press, 2009), 271–72.

and, increasingly, of contemporary political discourse. For Montesquieu's work is full of safe spaces, a concern for psychological health and security, and opposition to the way in which systems of power weaken and terrorize the spirit. Whereas the contemporary usage tends to surround questions of collective action and group identity, however, and to de-emphasize individual rights, for Montesquieu these rights are the currency of his description of property as a guarantor to the individual of his sense of security, and hence, his liberty. This understanding of property, taken together with Locke's more famous account, form the philosophic ground of modern liberalism, a ground which is all but abandoned not only in contemporary political science, but also increasingly in political practice as well. Are these developments inevitable, as some claim?[230] That the arguments for a politics which has the purpose of protecting individual liberty should lead, ultimately, to the favoring of group rights at the expense of individual rights, even that the philosophic justification for what we call the separation of church and state should lead only to a new kind of church-state union? Is liberalism itself incoherent? That is, by rejecting any spiritual purpose in politics, does it only set up a new, less salutary spiritual teaching?

Montesquieu is the thinker to go to for answers to these questions, because he is not as openly a natural rights thinker as Hobbes, Locke, or his successor, Rousseau. To put it simply, his account of the natural rights regime, or, as he puts it, the nation which has political liberty as its object, does not fully leave out questions of meaning and human purpose, focusing on limiting the purpose of government to the protection of life, liberty, and property: that is, he is explicit about how the citizen of such a nation would think about

[230] E.g., Adrian Vermeule, "A Christian Strategy," *First Things*, November 2017, https://www.firstthings.com/article/2017/11/a-christian-strategy.

meaning and purpose. And in *Spirit* as a whole, through the figure of the barbarian, the description of his passions and institutions, and the translation of these into the modern context, Montesquieu represents the commercial liberal republicanism that he implicitly promotes not as a compromise between religious and political claims to authority, as a practical solution that limits the ends of politics in order to put politics on a more stable foundation, but as a comprehensive moral order. As he says, he writes not about the laws, but the "spirit of the laws." The spirit of the laws is the moral order undergirding the laws, and the barbarian spirit that Montesquieu recovers and promotes, while it is embodied in a merely formal sense in property and commerce, is at its core about character; it is a set of virtues, a normative ethical prescription for what a human being should be and should do. Those peculiarly contemporary virtues, the virtues of liberalism, namely, tolerance, equality, self-expression, and recognition of identity, are those which Montesquieu's commercial barbarian is bred to respect. Thus, to the extent that these new virtues have come to demand great acts of humiliation and self-abnegation, and have led to persecution of adherents of traditional religions who are reluctant to adopt these new virtues, we are led to wonder if Montesquieu's own anti-despotism has led, unwittingly, to a new form of despotism.

However, Montesquieu is not an anti-religious teacher, but an anti-despotic one. Insofar as Christianity can be despotic, Montesquieu opposes it, but insofar as the contemporary liberalism he helped engender has become despotic, Montesquieu would recommend the same solution as is found in *Spirit*: the promotion of property as privacy of conscience, protecting the individual from the overreach of despotic public power. In the light of Montesquieu's teaching, the illiberalism of contemporary liberalism is not so much a consequence of liberalism but rather evidence of the perennial nature of the problem that

liberalism is meant to address: the importance of belief in the modern, Christian context, and the way that concern—even loving concern—with belief and with the health of the soul, can be destructive of something even more fundamental, even foundational: given man's natural human timidity, his need for a sense of security.

In this sense, modern liberalism is just as much a religion as Christianity is; it is a kind of sublimated Christianity, with its own creed, acts of devotion, liturgy, and acts of oppression.[231] Tocqueville, for his part, describes the oppressiveness of public opinion in America when that opinion is Christian, but he writes of Christianity only as the matter, not the form of the tyranny of the majority in the United States. It is an intellectual or spiritual tyranny: "In America the majority draws a formidable circle around thought…. It is not that [a writer] has to fear an auto-da-fé, but he is the butt of mortifications of all kinds and persecutions every day."[232] The protections for life and property seem to prove insufficient: "The master no longer says to [the human will]: You shall think as I do or you shall die; he says: You are free not to think as I do; your life, your goods, everything remains to you; but from this day on, you are a stranger among us."[233] It is a question whether in the face of such alienation the strength of the individual can be sufficient to resist ideological conformity, or whether, in the absence of participation in a political order made up of similarly strong individuals, where one feels free to express contrary opinions, security of mere life and property is meaningful.

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[231] See Adrian Vermeule, "Liturgy of Liberalism," *First Things*, January 2017, https://www.firstthings.com/article/2017/01/liturgy-of-liberalism, review of Ryszard Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (New York: Encounter Books, 2016). One might also point to the spread, in certain American cities, of yard signs that read, "In this House, We Believe: Health Care is a Human Right/ Black Lives Matter/ Women's Rights are Human Rights/ No Human is Illegal/ Science is Real/ Love is Love/ Kindness is Everything."

[232] *Democracy in America*, 1.2.7, 244.

[233] Ibid.

It is outside the scope of this work to examine whether Montesquieu's liberalism, meant to solve the problem of despotism, only creates a new form of despotism, and the means of property as privacy of conscience prove ineffectual in resisting that new despotism. But we close this section with an attempt to make clear the meaning of this question, and by so doing to outline a possible answer.

The difficulty is that both during the French monarchy of Montesquieu's lifetime, and today, conscience is both the problem and the solution.[234] It is conscience that feels the religious obligation to publicly avenge the dignity of God by identifying and punishing the sinner, to persecute the Jew, or to swear one's fidelity and intention to laws which run contrary to one's inclination.[235] Yet it is also conscience that is offended by persecution, conscience which can be called upon to check indignation and persecution.[236] In the final chapter of Montesquieu's last book on religion, he gives several examples of tolerant Eastern barbarian peoples, and of the Kalmucks writes that "they make it a matter of conscience to allow all sorts of religions" (25.15).[237] This indicates, if only barely and briefly, his own prescription for the conscience.

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[234] See again Pangle, *Theological Basis*, 136 and 178n15, for a contrary view. He sees the role of conscience in "the pious" persecutor and even in the one who is persecuted, but not in Montesquieu's own quasi-religious prescription for religious toleration. He notes that one of Montesquieu's rare uses of the word "conscience" is in reference to "the faith of the Kalmucks, who make toleration 'an affair of the conscience"' (25.15), but he does not connect this to Montesquieu's intention, which he describes instead as a "radical deemphasis on the conscience."

[235] 12.4; 25.13; bk. 27, 529.

[236] 10.2, 12.4, 25.13.

[237] 493n23: Montesquieu cites the 1726 work of Abu Al-Ghazi Bahadur (or Ebulgazi Bahadir Han), *Histoire généalogique des Tatars*, part 5. Cohler et al. suggest he has in mind a note by the translator, the relevant portion of which is the following: "The dominant religion in the city of Jerkeen, as well as in all the other towns and cities [of this region], is the Mohammedan cult, but all other religions enjoy a complete freedom, because the Kalmucks who are the masters of this country make it an affair of conscience not to allow people to be uneasy (*inquiète*) about them on account of their religion" (my translation). The reason given for the Kalmucks' toleration, both before and after the sentence here quoted, is their extensive commerce. It is remarkable that Montesquieu does not mention this in the chapter. However, this omission makes sense given the way book 25 is subtly a book on commerce embedded in the part of *Spirit* on religion.

It is a testament to the success of Montesquieu's project, and the work of other Enlightenment thinkers, that we generally think today of conscience as a private possession making no claim on others except that they respect the privacy and independence of one's beliefs and opinions. Indeed, that project has been so successful that it is usually Christians and other religious adherents who claim the rights of conscience in the face of what they perceive as intrusions by the government and culture of hostile secular liberalism.[238] There are Christian, and especially Catholic writers who note the individualist and liberal origins of our understanding of conscience, and look back to pre-Enlightenment thought for a more robust, less atomistic notion, one rooted in the relationship of man to God and not on man's willful self-assertion of his own independence.[239] There are also contemporary liberal thinkers who urge public, coercive action on the basis of conscience.[240] However, we generally still regard conscience not as a faculty requiring action, public or otherwise, but as a spiritual freedom not to have to act or to express agreement with any action or belief. As an obligation we have to others, conscience requires not proselytization or imposition of belief or opinion by force, but only respect for difference of opinion. What is sacred in the conscience is not any specific doctrine or moral dictate, but only respect for the right to

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[238] See Robert P. George, *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism* (Wilmington, DE: ISI Books, 2016); and generally, the framing of Daniel Dreisbach and Mark David Hall, eds., *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* (Indianapolis: Liberty Fund, 2010). For a counter-example, concerned with liberal conscience in opposition to the dangers of theocracy, see Lucas Swain, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Colombia University Press, 2006).

[239] E.g., Douglas P. McManaman, "Conscience," *Catholic Culture*, 2002, https://www.catholicculture.org/culture/library/view.cfm?recnum=6326.

[240] For an argument that applies Montesquieu's teaching on liberty to contemporary arguments and legal cases about group identity and social injustice, see Stephen L. Newman, "Free Speech and *The Spirit of Laws* in Canada and the United States: A Test of Montesquieu's Approach to Comparative Law," in Kingston, ed. *Montesquieu and His Legacy*, 221–36, esp. 224–31. Newman is modestly critical of the Canadian prioritization of group rights over the rights of individuals, but he finds nothing in the American model that is especially justified by Montesquieu's theory of liberty. Rather, he only argues that Montesquieu gives the conceptual tools to understand why the two countries would differ.

freedom of religion itself.

But how coherent and sustainable is a sacred teaching which is only negative, without positive content, that only says *do not* and never *do*, that prescribes entrance into the temple, but performs no mysteries there, and prescribes no devotion or fealty?[241] It would seem inevitable that such a formal and negative faith would spawn a positive public doctrine the importance of which would dwarf any vestigial private faiths: it would preach *toleration* of all faiths and thus implicitly preach the faith of toleration. This faith would hold that all faiths are of equal value, perhaps even that there is no legitimate public expression that would contradict this faith. In Montesquieu's work there is little that would contest and much that would promote such a faith, at least for commercial republics where, if not of equal value, religions have not the value that truth gives them, but the value that comes from their social utility.[242]

Furthermore, Montesquieu argues, "In order to enjoy liberty, each must be able to say what he thinks, and because, in order to preserve it, each must still be able to say what he thinks, a citizen… would say and write everything that the laws had not expressly prohibited him from saying or writing" (19.27, 327). No public doctrine of toleration could be secure without a common faith in the public sphere as the arena of free expression, where the clergy would have no more and no less freedom than all others "to persuade," but would nevertheless have to persuade (19.27, 330–31).[243] Beliefs and opinions must find common expression, but Montesquieu predicts that the love of liberty and the security of property will

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[241] See W.B. Allen, "Commentary" on Montesquieu's *Temple de Gnide*, in *The Personal and The Political* (Lanham, MD: University Press of America, 2008), 64–65.
[242] 24.1, ¶¶4–5; 24.4, ¶1; 24.14, ¶1; 24.19.
[243] Pangle, *Theological Basis*, 86–87, 166–67nn15–16.

trump all else (19.27, 326–27).[244] "In a free nation," he writes, "it often does not matter whether individuals reason well or badly; it suffices that they reason; from that comes the liberty that protects them from the effects of these same reasonings" (19.27, 332). In effect, in a liberal order, no argument could effectively be put forth that would destroy the ground of its own reasoning. This curious conclusion makes sense only in the light of two other elements of Montesquieu's prescription: the diffusion of vanity through commerce, and separation of powers. The first is meant to channel public-spirited grand projects, which can be so destructive of liberty, into a less dangerous ordinary acquisitiveness, and the second provides limits to the way common opinion can seize hold of the public power to punish dissenters from the present orthodoxy.

Whether Montesquieu is right that the liberal republicanism he promotes could not generate its own forces, or its own spiritual despotism, that could threaten the liberty of its citizens, it would not be correct to say that he fails to recognize the ties between politics and religion, the secular and the sacred, or the state and the church. The above, on the need for free speech as a reflection of political freedom, and ultimately, of freedom of conscience, is evidence of that. That very promotion of the tolerant, chaotic, even unhappy, but ultimately salutary civil society of liberal republicanism that we find at the end of book 19, at the end of volume 1 of *Spirit*, is already Montesquieu's answer to the *problem* of the religious conscience: that it *must out*, that it is not content to object silently, to be indignant, or to be ashamed, but it must act on the basis of its objections. The private conception of virtue wants to be reflected in the public sphere, wants to see justice done. This is the problem. Montesquieu's promotion of privacy of conscience is really the advancement of a new conception of virtue,

[244] Ibid., 165–66n8.

one that is perfectly public and religious even as it pretends not to be. It makes one indignant to see intolerance, suppression of freedom of religion and conscience, and violation of the rights of private property, "zealous for religion in general" (19.27, 330), but without any particular "zeal for the public good" (6.8) that would lead one to oppress others. That is the solution.

History and Prejudice

However, while the solution would remain the same in its form, in its matter Montesquieu's solution to the problem of despotism would be different today because the times are different. As a philosophic legislator in the sense in which he describes Plato,[245] Machiavelli,[246] and others, he is partly responsible for the present crises and incoherence of liberalism, but only partly; other legislators have intervened between him and us. The problem of despotism is perennial, or at least sempiternal in the context of Christianity, and property is just as lasting a solution to that problem, but the character of the people—not human nature—is distinct in different times and places, and consequently the change that a philosophic legislator should desire to effect in the people is also different.

The meaning of this non-historicist concern for the needs of different historical conditions can be understood best through attention to Montesquieu's use of the word "prejudices" (*préjugés*). The word appears frequently—five times—in the Preface, and should be contrasted there with the word "genius" (*genie*).[247] There he defines prejudice as what

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[245] See Chapter 1, "Plato's Laws," above.

[246] *Spirit*, 29.19, 11.5; *Pensées* 1248, 1911. See Chapter 1, "Plato's Laws"; Chapter 2, "Book 10: Commentary on Machiavelli"; Chapter 3, "Book 18: The Salic Enclosure"; and Chapter 4, "Religion, Commerce, and Liberty," above.

[247] See Chapter One, "Plato's Laws"; and Chapter Two, "Commentary on Machiavelli," above.

makes one "unaware of oneself"; "genius," by contrast, is what allows one—at least a philosopher—to understand oneself (Preface, ¶¶13, 9). Both of these words also have their national correlates: a national prejudice is in the character of a people, a deficiency in its understanding, while a national genius is what comprehends or explains a people as a whole, or what it is good at. In the Preface, we find both individual and national examples. Montesquieu writes that he "did not draw [his] principles from [his] prejudices but from the nature of things" (¶6) and that he "[has not] totally lacked genius" (¶16), and refers both to "the prejudices of the nation" (¶10; cf. ¶¶13, 11) and to the prejudices of individuals (¶6, 10). We also find a link between individual and national prejudice in the claim that "the prejudices of magistrates began as the prejudices of the nation" (¶10).

Magistrates are not exactly legislators or philosophers, but later in the book, in an obscure passage, we find another example of the relation between individual and national prejudices. At the end of the last chapter of book 29, Montesquieu writes, "The laws always meet the passions and prejudices of the legislator. Sometimes they pass through and are colored; sometimes they remain there and are incorporated" (29.19). Earlier we examined this passage in considering how the laws pre-exist any philosophic-legislative writing.[248] Now, in closing, we are in a position to explain this passage in greater depth. A simple reading might yield the conclusion that Montesquieu believes that all writings are historically conditioned, and that in order to understand them, a reader must take into account the ways that an author is unwittingly affected by the time and place in which he writes. But while Montesquieu is saying that all philosophic authors are in a way prejudiced, he also makes a distinction here between laws that are merely "colored" by "the passions and prejudices of

[248] Chapter One, "Ovid Epigraphs," above.

the legislator" and those that are "incorporated" into those passions and prejudices. The second case is stronger; the writer in such a case unwittingly legislates prejudices. The first case is weaker; in such a case, the writer takes into account the passions and prejudices of his time and place.

The fundamental distinction here is between those writers who are aware of, or at least take into account, the prejudices of their times, and those who do not. In either case, it is possible for a reader to ascertain the truth though the historical coloring of the writing. In the penultimate paragraph of volume 1, at the end of book 19, Montesquieu writes, "In extremely absolute monarchies, historians betray the truth because they do not have the liberty to tell it; in extremely free states, they betray truth because of their very liberty for, as it always produces divisions, each one becomes as much the slave of the prejudices of his faction as he would be of a despot." That is to say, there are always limitations on what a writer may say, whether from external or internal pressure, and a careful reader may sometimes glean from the apparent deficiency of a text the conditions that have led to that deficiency.[249] More importantly for the distinction between the intelligent and the ignorant author, Montesquieu writes in the *Pensées*:

> I never judge men by what they have or have not done as a result of the prejudices of their times. Most great men have been subject to them. The problem is when they have added their own. For most of the time, I might add, they have not seen the prejudices of their times, because they have not wanted to see them.[250]

While this note is not necessarily about writers, it both contains a clear distinction between the prejudices of the times and the prejudices of individuals, and a clear indication of

[249] See Warner, "Montesquieu's Address."
[250] *Pensées*, 764. See also 911: "One will never think well of men if one does not give them a pass on the prejudices of their times."

Montesquieu's observation of the effect that the prejudices of the times can have on individual actions, which presumably includes what a writer does or does not write. In either case, an author's writing will always in some way reflect the prejudice of the times, but this need not mean that the author's writing is historically bound.

What makes Montesquieu's argument unique is his indirect claim that the more an author tries to escape or ignore the prejudices of his times, the more likely his work is to be an unwitting reflection of those prejudices. In the *Pensées*, he gives as one of his maxims of politics, "The prejudices of the age must be well known, so as to avoid either offending them too much or following them too much."[251] If one does not know those prejudices as prejudices, his actions and his writing will be an unwitting reflection of them. We find this idea again in *Spirit* in the chapter "On legislators," albeit presented much more obliquely. There, Montesquieu gives five writers—six if we count separately "a crowd of writers"—as examples. While the first three, Plato, Aristotle, and Machiavelli, have as passions and prejudices their contemporary historical circumstances, the latter two, More and Harrington, failed to see the present historical reality of England: More looked to the ideal of "the Greek town" in writing his *Utopia*, "[speaking] rather of what he had read than of what he had thought," presumably as a statesman closely involved in English politics, while Harrington "saw only the republic of England," not the system of liberty Montesquieu has eyes to see (29.19). At the very end of the chapter on the English constitution, Montesquieu writes, "Harrington, in his *Oceana*, has also examined the furthest point of liberty to which the constitution of a state can be carried. But of him it can be said that he sought this liberty

[251] *Pensées*, 1007, no. XVIII. See also 190: "For myself, I would rather not write history than write it for the purpose of following the prejudices and passions of the times."

only after misunderstanding it, and that he built Chalcedon with the coast of Byzantium before his eyes" (11.6, 166). Byzantium represents England; Chalcedon, the inferior city, the result of 'seeking' rather than 'finding' (11.5).[252]

More in *Utopia*, Harrington in *Oceana*, and "the crowd of writers [who] found disorder wherever they did not see a crown" (29.19) can all be said to have missed what Montesquieu saw, the special form of the English constitution, a "republic [hiding] under the form of monarchy" (5.19, 70; see also 2.4, 8.9). More and Harrington created ideal societies as a way not to have to address the specific conditions of England, but in so doing inadvertently reflected their personal prejudices in their writings, instead of giving principles, borne, as Montesquieu claims his are, from the nature of things. The same deficiency might be said to apply to the three earlier legislators, although only Plato could be said to have legislated an ideal.[253]

In the scheme of 29.19, "the laws" represents the present order of things, while the legislators are those who, after having recognized that order, attempt to change it. In a note in the *Pensées* entitled, simply, "LEGISLATORS," Montesquieu writes, "Lycurgus did all he

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[252] This is likely a reference to Tacitus, *Annals*, 12.63. This observation was made by Arthur Murphy, trans., *Tacitus*, 8 vols. (London: Colburn and Bentley, 1830), vol. 2, 227n1. Céline Spector, "James Harrington," §2, in *A Montesquieu Dictionary* [online], suggests other possibilities: Herodotus, 4.144, and Polybius, 4.24.

[253] Plato's ideal, of course, is the aristocracy of the *Republic*, although see *Pensées*, 1208, where Montesquieu writes that the *Republic* is not a purely imaginary state, and not an ideal. Insofar as Aristotle legislates an ideal, it would he his description of the Greek polis in the time of Alexander, when the Greek polis no longer existed. Cesaré Borgia would be Machiavelli's ideal, a sort of realist counterweight to the imagined principalities of the Italian situation, while the ideals of More and Harrington would be the Greek polis and the ideal republic, respectively. On Plato and Aristotle, specifically, see *Pensées*, 1321: "One likes to read the Ancients' books to see other prejudices." Cf. *Pensées*, 1424: "What makes us so prejudiced for our moderns is that the new discoveries seem more surprising to us than the ancient ones, which no longer move us and which are always our starting point. We have become familiar with them, and it seems to us that everyone could have made those discoveries. But add up the total for the ancients and moderns, and you will see." Evidence that Montesquieu reads Plato's "ideal" as a response to, rather than evidence of his own prejudice, can be found at *Pensées*, 711 and 853. See also *Pensées*, 1859, where Montesquieu expresses his agreement with Plato, re: *Republic*, book 9, that the purpose of the laws is "to announce the orders of reason to those who cannot receive it immediately from itself."

could to make his citizens more warlike; Plato and Thomas Morus, more honorable; Solon, more equal; the Jewish legislators, more religious; the Carthaginians, more wealthy; the Romans, more magnanimous."[254] Prejudice has to do with what a people honors; early in *Spirit*, honor is defined simple as "the prejudice of each person and each condition," representing and taking the place of political virtue (3.6).[255] The legislator is one who attempts to correct or redirect that prejudice: William Penn, Montesquieu writes, "is a true Lycurgus; and, though he has had peace for his object as Lycurgus had war, they are alike in the unique path on which they have set their people, in their ascendancy over free men, in the prejudices they have vanquished, and in the passions they have subdued" (4.6, 37). A legislator attempts to change the people's character but must do so by being attentive to that character.

Implicit in the notion of the change of character, however, is the presumption that through legislation one is making the people *better*. In what does this *better* consist? Legislation cannot be described simply as the attempt to replace one prejudice by another, or if it is that, at least one must believe that the new prejudice will be better than the old one.[256] One must take the people as they are, it is true, but one must attempt to elevate them in some way based on their present condition, using the material of that condition. Montesquieu sometimes describes this as a process of enlightenment. This enlightenment involves reason,[257] but not Reason: it is not, as Machiavelli characterized it, an appeal to

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[254] *Pensées*, 1911 and 1248. Capitalization in original.
[255] See also 4.2, 34n2.
[256] Cf. *Pensées*, 767: "ENGLISH. If I am asked which prejudices they have, I would in truth not know which to answer: neither war, nor birth, nor dignities, nor men who get lucky, nor the frenzy over ministerial favor. They want men to be men. They set store by the Duke of Marlborough, Lord Cobham, the Duke of Argyll, because they are men. They respect only two things: wealth and personal merit."
[257] Cf. *Spirit*, 15.3.

"imagined republics or principalities,"[258] but an account of actually existing political orders that gives to them self-knowledge, awareness of what it is that animates and makes healthy their states. Montesquieu's attention to all of the various relations—mores, manners, laws, etc.—within states is presumably what allows him to say, "I did not draw my principles from my prejudices but from the nature of things" (Preface, ¶6). It is unclear whether he means in 29.19 that Plato, Aristotle, and even Machiavelli have failed to do the same. At any rate, it is evident that part of what he means by the prejudices of the legislator is their passing judgment with scorn on the present condition of things, for example, that Plato "was indignant at the tyranny of the people of Athens" (29.19). In a similar vein, Montesquieu writes in the *Pensées*:

> All I have had before my eyes is my principles; they guide me, and I do not lead them. I am second to none in my belief that those who govern have good intentions. I know there is such and such a country that is badly governed, but also that it would be very difficult for it to be better governed. In the end, I see more than I pass judgment on; I reason on everything and criticize nothing.[259]

In reasoning on everything, and presenting that reasoning to his readers, Montesquieu aims not to scold and correct, but to present reasons. By so doing, he aims to enlighten, and thus to help correct destructive prejudices. In the Preface of *Spirit*, in three consecutive paragraphs, he writes of how he could "consider [himself] the happiest of mortals" (¶¶11–13). Among those conditions are "[i]f I could make it so that everyone had new reasons for loving his duties, his homeland and his laws" and "if I could make it so that men were able to cure themselves of their prejudices." In the next paragraph, he writes that man "is equally capable of knowing his own nature when it is shown to him, and of losing even the feeling

[258] *The Prince*, ch. 15, p. 61.
[259] *Pensées*, 1873.

of it when it is concealed from him." In *Spirit*, then, is Montesquieu destroying prejudices by enlightening man, showing him his nature, and thereby giving to citizens new reasons for obedience, and to rulers new reasons for just and prudential statesmanship?

This conclusion would be too strong, for Montesquieu speaks not directly of enlightenment in the intellectual sense, but of something else. *His* are the principles; they are never clearly or fully articulated. Rather, the enlightenment is a *showing* to man of the present situation, a laying bare of the modern reality, a revelation to citizen and ruler alike of what path lies open to him. Montesquieu legislates by articulating the revolution that commerce has effected in the world. The great example of this is when he writes in the chapter, "How commerce in Europe penetrated barbarism" that the invention of letters of exchange has "obliged" "theologians… to curb their principles" (21.20). Commerce, though, is the new barbarism; it "cures destructive prejudices" through the encouragement of prudence and peace as the barbarian conquest of the Roman Empire did through war: "A conquest can destroy harmful prejudices, and, if I dare speak in this way, can put a nation under a better presiding genius" (10.4).[260] Montesquieu aims not necessarily to destroy prejudice, but to establish more reasonable ones.[261] His promotion of property as privacy of conscience has as its aim not the production of reasonable citizens—the chapter on English mores is evidence of that[262]—but the transformation of prejudice into something productive, rather than destructive, of liberty.

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[260] Cf. *Spirit*, 10.14 ("[Alexander] resisted those who wanted him to treat the Greeks as masters and the Persians as slaves; he thought only of uniting the two nations and wiping out the distinctions between the conquerors and the vanquished.") with 11.8 ("it is remarkable that the corruption of the government of a conquering people [the Germans] should have formed the best kind of government men have been able to devise."

[261] See *Spirit*, 28.23 and *Pensées*, 1799, esp. the last sentence: "There is plenty of difference between the mores that commerce inspires and those that a vast conquest forces people to take on."

[262] *Spirit*, 19.27, 332. But cf. *Pensées*, 767.

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